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Supreme Court, U.S.
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No. 97-

In the Supreme Court
of the United States

October Term, 1996

IRVING C. STEVENS AND JEANETTE STEVENS,

Petitioners,

v.

CITY OF CANNON BEACH and STATE OF OREGON, acting by and through its Department of Parks and Recreation, Division of State Lands, Land Conservation and Development Commission, and Judicial Department,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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128 pp

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IRVING C. STEVENS; JEANETTE E. STEVENS,	)	
Plaintiffs-Appellants,	)	No. 95-35837
v.	)	DC No. CV-95-00455-HJF
CITY OF CANNON BEACH; STATE OF OREGON, Acting by & through its Department of Parks & Recreation, Division of State Lands, Land Conservation & Development Commission & Judicial Department,	)	ORDER*
Defendants-Appellees.	)	

Appeal from the United States District Court

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

for the District of Oregon
Helen J. Frye, District Judge, Presiding

Argued and Submitted: January 9, 1997
Portland, Oregon

Before: ALDISERT,** PREGERSON, and THOMAS, Circuit Judges.

We affirm for the reasons set forth in the well-written well-reasoned opinion of the district court published at 893 F. Supp. 944 (D. Or. 1995).

** Honorable Ruggero J. Aldisert, Senior Circuit Judge for the Third Circuit, sitting by designation.

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DISTRICT OF OREGON
PORTLAND, OREGON
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7-19-95
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

IRVING C. STEVENS and JEANETTE E. STEVENS, Plaintiffs, v. CITY OF CANNON BEACH and STATE OF OREGON, acting by and through its DEPARTMENT OF PARKS AND RECREATION, DIVISION OF STATE LANDS, LAND CONSERVATION AND DEVELOPMENT COMMISSION, and JUDICIAL DEPARTMENT, Defendants.	Civil No. 95-455-FR J U D G M E N T

IT IS HEREBY ORDERED AND ADJUDGED that

judgment is entered in favor of defendants and against plaintiffs.

DATED this 18 day of July, 1995.

HELEN J. FRYE
United States District Judge

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

IRVING C. STEVENS and JEANETTE E. STEVENS, Plaintiffs, v. CITY OF CANNON BEACH and STATE OF OREGON, acting by and through its DEPARTMENT OF PARKS AND RECREATION, DIVISION OF STATE LANDS, LAND CONSERVATION AND DEVELOPMENT COMMISSION, and JUDICIAL DEPARTMENT, Defendants.	Civil No. 95-455-FR O P I N I O N

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FRYE, Judge:

The matters before the court are (1) the motion of the defendant City of Cannon Beach to dismiss (#13); and (2) the motion of the defendant State of Oregon to dismiss (#14).

ALLEGATIONS OF THE COMPLAINT

In 1917, the Ecola Inn was built on property to the south of Tax Lots 8500 and 8501. It was built on a promontory created over the dry sand beach by the construction of a wooden retaining wall located approximately 300 feet east of the boundary of the mean

high water mark.

In 1933, E.A. Hollingshead extended the original seawall north, some 300 feet, to the east of which the present "Surf, Sand and Resort Hotel" was built. That seawall abuts the south boundary of Tax Lot 8501.

In 1957, the plaintiffs, Irving C. Stevens and Jeanette E. Stevens, purchased Tax Lots 8500 and 8501 located immediately north of the "Surf, Sand and Resort Hotel" property, with the expectation of developing it for motel/hotel use.

In 1966, the owners of the "Surf, Sand and Resort Hotel" property, placed driftwood logs upright in front of their seawall and strung a wire between the driftwood logs to allow their resort guests use of the area of dry sand.

In 1967, the Oregon legislature adopted O.R.S. 390.605 et seq., declaring as its policy, in part:

> The Legislative Assembly recognizes that over the years the public has made frequent and uninterrupted use of the ocean shore and recognizes, further, that where such use has been legally

> sufficient to create rights or easements in the public through dedications, prescription, grant or otherwise, that it is in the public interest to protect and preserve such public rights or easements as a permanent part of Oregon's recreational resources.

O.R.S. 390.610(2). This legislation provided for improvements upon the dry sand portion of the ocean shore pursuant to a permit system to be administered by the Department of Transportation (now the Department of Parks and Recreation). O.R.S. 390.635-655.

Tax Lot 8500 is above and east of the zone line required by O.R.S. 390.605, which was adopted in 1969 to define the eastern boundary of the ocean shore. Tax Lot 8501 lies west of the statutory line and extends westerly to the mean high tide line of the Pacific Ocean.

In 1968, the State of Oregon brought suit in the Circuit Court of the State of Oregon for the County of Clatsop in *State ex rel Thornton v. Hay*, seeking a mandatory injunction for removal of the fence erected by the owners of the "Surf, Sand and Resort Hotel" property. The

Clatsop County Circuit Court found in favor of the State of Oregon and entered a decree enjoining the fence maintenance based upon the doctrine of the owner's implied dedication to the State of Oregon of a public recreational easement to the dry sands of the beach.

In December of 1969, the Oregon Supreme Court decided the appeal of the *Thornton* case. The Oregon Supreme Court affirmed the decision of the Clatsop County Circuit Court on the grounds that the English common law doctrine of custom supported the recreational easement.

In 1970, Irving and Jeanette Stevens sought a permit from the State of Oregon to construct a retaining-seawall around the east 120 feet of Tax Lot 8501. This permit was denied.

In 1973, the Oregon legislature formed the Land Conservation and Development Commission (LCDC). On December 18, 1976, the LCDC adopted Goal 18 "BEACHES AND DUNES." In 1985, the LCDC amended

Goal 18 to require local governments and state agencies to prohibit any residential, commercial or industrial buildings on "Beaches."

In 1982, Irving and Jeanette Stevens sought to obtain from the Department of Parks and Recreation of the State of Oregon a relocation of the statutory beach zone line to the actual beach vegetation line. This request was denied. In 1984, the Stevens again sought to readjust the statutory beach zone line to conform to the beach vegetation line. This request was denied. This denial was appealed to the Transportations Commission of the State of Oregon. The appeal was denied on the grounds that the Parks and Recreation Department would not adjust the beach zone line on behalf of an individual private property owner.

In 1986, the City of Cannon Beach enacted Ordinance Section 3.180 to implement Goal 18. Section 3.180 creates an Active Dune and Beach Overlay Zone, which prohibits all residential development and all

commercial or industrial buildings on the beach.

On August 24, 1989, Irving and Jeanette Stevens and the lessee of the land jointly applied to the Department of Parks and Recreation for a permit to build a replacement retaining-seawall in front of the "Surf, Sand and Resort Hotel," as the old wall was deteriorating, and to extend the replacement retaining-seawall across the east end of Tax Lot 8501 stabilize it for construction of the motel contemplated by the lease. In addition, the Stevens and the lessee filed applications with the Division of State Lands for a fill permit and with the City of Cannon Beach for a permit to build the retaining wall. Each of the applications for permits were denied on the grounds that, while zoned for residential/motel use, the property was subject to amended Goal 18, which prohibits all residential, commercial or industrial development.

Irving and Jeanette Stevens thereafter filed an amended complaint in the Clatsop County Circuit Court for

inverse condemnation and a petition for *de novo* review, pursuant to O.R.S. 390.658, alleging that the City of Cannon Beach and the State of Oregon had taken their property by regulation and by unconstitutionally applying the prohibition of Goal 18 to their property under the Fifth and Fourteenth Amendments to the United States Constitution.

The City of Cannon Beach and the State of Oregon moved to dismiss the action in the Clatsop County Circuit Court on the grounds that the *Thornton* case held that owners of dry sand beaches in the State of Oregon hold their private property, between the statutory beach zone line and the mean high tide line, subject to a recreational easement based upon the English common law doctrine of custom. Irving and Jeanette Stevens opposed the motion to dismiss.

In a letter opinion dated January 8, 1991, the Honorable Thomas E. Edison, Circuit Court Judge, ruled that the *Thornton* case stood for the rule that the owners of beach front, dry sand property in the State of Oregon had no

right to exclude the public from the dry sand, and therefore the inverse condemnation action of Irving and Jeanette Stevens was barred because no property right in the beach front was taken from the Stevens.

On March 20, 1991, Irving and Jeanette Stevens filed a notice of appeal to the Oregon Court of Appeals. Following briefing and argument, the Oregon Court of Appeals on August 5, 1992 affirmed the trial court.

On September 2, 1992, Irving and Jeanette Stevens filed a petition for review with the Oregon Supreme Court, which petition was granted. On July 1, 1993, the Oregon Supreme Court rendered its decision affirming the lower court's ruling.

On September 27, 1993, Irving and Jeanette Stevens filed a petition for a writ of certiorari in the United States Supreme Court. On March 21, 1994, the United States Supreme Court denied the petition of the Stevens for a writ of certiorari, two justices dissenting.

On April 12, 1995, Irving and Jeanette Stevens filed this action in the United States District Court for the District of Oregon. In their complaint, the Stevens allege six claims for relief as follows: (1) the deprivation of property without due process of law; (2) the deprivation of property without substantive due process and without the equal protection of the law; (3) declaratory relief; (4) injunctive relief; (5) damages against the City of Cannon Beach; and (6) attorney fees and costs.

The Stevens seek an evidentiary hearing, as well as (1) a declaratory judgment declaring unlawful the action by the City of Cannon Beach and the State of Oregon which causes and has caused the Stevens to suffer a continuing physical invasion and deprivation of all right to develop their property; and (2) a preliminary and permanent injunction directing the City of Cannon Beach and the State of Oregon to cease from denying to the Stevens a permit to develop their property on the grounds that amended Goal 18

and the *Thornton* case decision bars any development upon the dry sand beach by Irving and Jeanette Stevens.

CONTENTIONS OF THE PARTIES

The State of Oregon contends that this action must be dismissed on the grounds that the claims of Irving and Jeanette Stevens are barred by the doctrine of *res judicata,* the Eleventh Amendment; and absolute judicial immunity. The State of Oregon contends that Irving and Jeanette Stevens seek to relitigate claims that they have already pursued through the courts of the State of Oregon and to the United States Supreme Court.

Irving and Jeanette Stevens contend that the doctrine of *res judicata* cannot be applied to this federal action because (1) the issue of procedural due process was not raised until after oral argument in the Oregon Court of Appeals; and (2) there has been a fundamental shift in the law in *Lucas v. South Carolina Coastal Council,* ____ U.S. ____, 112 S.Ct. 2886 (1992), so as to make the application

of the doctrine of claim preclusion unfair. The Stevens argue that they should be allowed to proceed on their claim that they have been denied their right to procedural due process.

STANDARD OF REVIEW

A motion to dismiss under Rule 12(b)(6) will only be granted if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Gibson v. United States,* 781 F.2d 1334, 1337 (9th Cir. 1986), *cert. denied,* 479 U.S. 1054 (1987). The review is limited to the complaint, and all allegations of material fact are taken as true and viewed in the light most favorable to the non-moving party. *Cassettari v. Nevada County, Cal.*, 924 F.2d 735, 737 (9th Cir. 1987).

APPLICABLE LAW

The Full Faith and Credit Act, 28 U.S.C. § 1738, requires a federal court to give the same preclusive effect to a state court judgment as another court of that State would

give. "Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so." *Allen v. McCurry,* 449 U.S. 90, 96 (1980).

Oregon courts give preclusive effect to final judgments of the state courts to bar subsequent claims "based on the same factual transaction" that was at issue in the first case, as long as the claims are "of such a nature as could have been joined in the first action." *Van De Hey v. United States Nat'l Bank,* 313 Or. 86, 91, 829 P.2d 695 (1992) (quoting *Drews v. EBI Cos.,* 310 Or. 134, 140, 795 P.2d 531 (1990)).

Res judicata "bars subsequent actions on all grounds for recovery that could have been asserted, whether they were or not." *Palomar Mobilhome Park Ass'n v. City of San Marcos,* 989 F.2d 362, 365 (9th Cir. 1993).

ANALYSIS

In the state court action challenging the denial of the

1989 application of Irving and Jeanette Stevens to build a retaining seawall on their dry sand beach property in Cannon Beach, the Oregon Court of Appeals stated:

> After oral arguments in this case, the United States Supreme Court decided *Lucas v. South Carolina Coastal Council,* 505 U.S. ___, 112 S.Ct. 2886, 120 L Ed 2d 798 (1992). The Court said:
>
> > "Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." 505 US at ____, 120 L Ed 2d at 820. (Footnote omitted.)
>
> The opinion makes it clear that that issue is to be decided under the "State's law of property and nuisance." _____ US at _____, 120 L Ed 2d at 821.
>
> *State ex rel Thornton v. Hay,* [254 Or. 584, 462 P.2d 671 (1969)], is an expression of state law that the purportedly taken property interest was not part of plaintiffs' estate to begin with. Accordingly, there was no taking within the meaning of the Oregon or United States Constitutions. The trial court did not err by dismissing the taking claims.

Stevens v. City of Cannon Beach, 114 Or. App. 457, 835 P.2d 940 (1992) (footnote omitted).

In the opinion of the Oregon Supreme Court affirming the decision of the Oregon Court of Appeals filed on July 1, 1993, the Oregon Supreme Court discussed and examined *Lucas.* The Oregon Supreme Court states, in part:

> Applying the *Lucas* analysis to this case, we conclude that the common-law doctrine of custom as applied to Oregon's ocean shores in *Thornton* is not "newly legislated or decreed"; to the contrary, to use the words of the *Lucas* court, it "inhere[s] in the title itself, in the restrictions that background principles of the State's law of property and nuisance already placed upon land ownership." *Id.* at 821. As noted in *Hay v. Bruno, supra,* 344 F Supp at 289, "there was no sudden change in either the law or the policy of the State of Oregon. For at least 80 years, the State as a matter of right claimed an interest in the disputed land." Plaintiffs' argument that a "retroactive" application of the *Thornton* rule to their property is unconstitutional, is not persuasive. *Thornton* did not create a new rule of law and apply it retroactively to the land at issue in that case, *Hay v. Bruno, supra;* nor did *Thornton* create a new rule of law as applied to plaintiffs' land here. *Thornton* merely enunciated one of Oregon's "background principles of * * * the law of property." *Lucas, supra,* 120 L Ed 2d at 821. We therefore agree with the Court of Appeals, which concluded that the trial court's reading and application of *Thornton* were correct. 114 Or App at 459.

Stevens v. City of Cannon Beach, 317 Or. 131, 142-43, 854 P.2d 449 (1993).

On March 21, 1994, the United States Supreme Court denied certiorari on the appeal of the Stevens from the decision of the Oregon Supreme Court. ___ U.S. ___, 114 S.Ct. 1332 (1994).

In their complaint, Irving and Jeanette Stevens state a claim of relief based upon the same facts alleged in the state court -- the denial of the Stevens' application for a permit to build a retaining seawall. The Stevens contend that this court should relitigate these same facts on the grounds that there has been a new, fundamental shift in the applicable law in *Lucas v. South Carolina Coastal Council,* ___ U.S. ___, 112 S.Ct. 2886 (1992), which requires an evidentiary hearing on the issue of whether the law of custom applies to a particular tract of land.

This issue has been decided by the Oregon Supreme Court in *Stevens v. City of Cannon Beach,* 317 Or. at 142-43. The opinion of the United States Supreme Court in *Lucas* filed on June 29, 1992 has been specifically noted,

applied and/or distinguished by the Oregon Court of Appeals, by the Oregon Supreme Court, and by the United States Supreme Court in the dissent published with the denial of the petition for a writ of certiorari. By March 21, 1994, the date that the United States Supreme Court denied the petition of the Stevens for a writ of certiorari and the date that the decision of the Oregon Supreme Court became final, the *Lucas* opinion had been law for one year and nine months and had been fully applied by the Oregon courts to the same parties and the same facts before the court in this case.

There are no facts in this case to support the claim of Irving and Jeanette Stevens that *res judicata* should not apply to the decision of the state court because of a new and fundamental shift in the law applicable to the claims made by the Stevens. The Stevens had a full and fair opportunity to present any and all issues relating to their claim that the actions of the City of Cannon Beach and the State of Oregon

constituted a taking without due process.

To the extent that Irving and Jeanette Stevens seek to state a new or different claim that they were deprived of their right to due process of law because the state court disposed of the taking claim on a motion to dismiss without an evidentiary hearing, this claim is barred by the doctrine of *res judicata.* The full record of procedure used by the trial court and the Oregon Court of Appeals was before the Oregon Supreme Court. In addition, these same procedural facts were before the United States Supreme Court when the petition for a writ of certiorari was denied. The Stevens had a full and fair opportunity to present any and all issues relating to any claim that the procedure followed was not adequate. The Oregon Supreme Court has determined that there was no taking within the meaning of the Oregon or United States Constitutions. This determination, even if erroneous, operates to preclude consideration of this issue and all other issues which could have been asserted in the

state court action. *See Palomar Mobilhome Park Ass'n v. City of San Marcos,* 989 F.2d at 365.

CONCLUSION

The issue before the court involving the parties before this court has been litigated to final judgment in the courts of the State of Oregon. All parties had a full and fair opportunity to present their cases. The doctrine of *res judicata* bars this action.

The motions to dismiss of the City of Cannon Beach (#13) and the State of Oregon (#14) are granted.

DATED this 18 day of July, 1995.

HELEN J. FRYE
United States District Judge

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

IRVING C. STEVENS and JEANNETTE E. STEVENS Plaintiffs, v. CITY OF CANNON BEACH and STATE OF OREGON, acting by and through its DEPARTMENT OF PARKS AND RECREATION, DIVISION OF STATE LANDS, CONSERVATION AND DEVELOPMENT COMMISSION, and JUDICIAL DEPARTMENT, Defendants.	Civil No. CV94-455-FR PLAINTIFF'S RESPONSE TO CITY OF CANNON BEACH'S AND STATE OF OREGON'S MOTIONS TO DISMISS (ORAL ARGUMENT REQUESTED)

****

Neither the court of appeals nor the supreme court addressed the substance of Plaintiffs' argument that Lucas gave them a procedural due process right to an evidentiary

hearing as to the applicability of custom to their land. Each court merely reiterated Thornton's holding that the dry-sand beaches were subject to custom so that no private owner had property rights in them. Stevens v. City of Cannon Beach, 114 Ore. App. 457, 459 n.2, 835 P.2d 940 (1992); Stevens v. City of Cannon Beach, 317 Ore. 131, 854 P.2d 449 (1993).

E. Plaintiffs' Petition for Writ of Certiorari to the U.S. Supreme Court.

Plaintiffs petitioned the United States Supreme Court for a writ of certiorari. Certiorari was denied, with a dissent by Justice Scalia, joined by Justice O'Connor. In the dissent to the denial of certiorari, Justice Scalia noted Thornton's sweeping pronouncement of a state-wide recreational easement to Oregon's beaches was apparently limited by McDonald v. Halvorson, 308 Or 340, 78 P.2d 714 (1989, which held that there had to be proof of ancient recreational use for the doctrine of custom to apply:

"'The doctrine of custom announced in

> [Thornton] simply does not apply to this [the McDonald] controversy. The public has no right to recreational use of the [dry-sand beach area of the cove] because there is no factual predicate for the application of the doctrine.'" Stevens v. City of Cannon Beach et al, _____ U.S. _____, 114 S. Ct 1332, _____ (1994).

The absence of an evidentiary hearing in the Stevens case, as seemingly necessary to provide the "factual predicate" of actual ancient recreational use, led the dissenters to believe that Thornton ". . . creat[ed] the doctrine rather than describ[ed] it." Id. at _____ U.S. ____, 114 S. Ct. ____ n.4.

The dissent concluded by noting:

> Petitioners, who owned this property at the time Thornton was decided, were not parties to that litigation. Particularly in light of the utter absence of record support for the crucial factual determinations in that case, whether the Oregon Supreme Court chooses to treat it as having established a "custom" applicable to Cannon Beach alone, or one applicable to all "dry-sand" beach in the State, petitioners must be afforded an opportunity to make out their constitutional claim by demonstrating that the asserted custom is pretextual. If we were to find for petitioners on this point, we would not only set right a procedural injustice, but would hasten the clarification of Oregon substantive

> law that casts a shifting shadow upon federal constitutional rights the length of the State." Id. ____ U.S. ____, 112 S. Ct 2904.

F. Federal District Court Complaint.

In 1995, Plaintiffs filed suit in the Federal District Court of Oregon, seeking injunctive and declaratory relief under 42 U.S.C. 1983 and 1988 against the City of Cannon Beach and the State of Oregon for violation of Plaintiffs' rights to procedural and substantive due process and equal protection under the Fifth and Fourteenth Amendments to the United States Constitution. The gravamen of Plaintiffs' complaint is that they have been denied their right to procedural due process, which, was defined by Lucas in mid-appeal stream and which entitles them to an evidentiary hearing to determine whether the doctrine of custom was pretextual and, if not, whether it was rightly applied to Plaintiffs' property. These are issues never fairly addressed by the state courts.

In addition to their procedural due process claims,

Plaintiffs allege a takings in violation of their right to substantive due process and equal protection of law, in view of post-Thornton private development upon the dry sand area of the beaches. This second claim cannot be evaluated until Plaintiffs' receive the evidentiary hearing to which due process entitled them, because, neither in Plaintiffs' state court case, which was decided on a motion to dismiss, nor in Thornton itself, where the doctrine of custom was first injected into the case at the Supreme Court level, was any factual record established.

III.

ARGUMENT

I. PLAINTIFFS' COMPLAINT IS NOT BARRED BY PRECLUSION.

The State argues that under the Full Faith and Credit Act, 28 U.S. section 1738, Plaintiffs' complaint is barred by res judicata and should be dismissed. The State argues that

"Plaintiffs' claims are against the same parties,

> and they are based on the same factual transaction--the denial of their application to build a retaining seawall. There is no reason why plaintiffs could not have litigated all these claims in the first case, and in fact, they did litigate all but the equal protection claim[.]"

State's Memorandum at 4. There is no merit to the State's argument, which is based upon a fundamental misconception of the difference between Plaintiffs' federal and state complaints.

It is true, as the State points out, that any takings claim Plaintiffs might bring would necessarily arise out of the single factual transaction of the City and State's denial of a permit to construct a retaining seawall. What the State fails to understand, however, is that the issue of what procedural process, as defined by Lucas, is due to Plaintiffs in regard to their right to an evidentiary hearing on the applicability of the doctrine of custom to their land, is a new, fundamental shift in the law of taking without compensation. The change in the law was created by Lucas,

and was not addressed by the Oregon courts.

Plaintiffs could not have litigated their procedural due process claim in the state trial court because Lucas, which was decided after the filing and dismissal of Plaintiffs' complaint, for the first time held that the state has the burden of proving that a doctrine within its common law of property in fact pre-existed Plaintiffs' title and inhered in it. And that the doctrine actually could be used to prohibit a use sought because of factual proof of ancient prior us satisfying the seven elements of the English common-law doctrine. Thus, prior to Lucas, Oregon's procedure in allowing dismissal of a complaint based upon the ground that plaintiffs had no right to build anything on the dry-sand beach, so no taking had occurred other than by the denial of the building permit, was apparently within the sound discretion of the trial court, as the Supreme Court had not, as of that time, shifted the burden of proof (risk of non-persuasion) onto the State.

The Oregon state court judgment cannot be res judicata to Plaintiffs' federal complaint for two fundamental reasons:

First, the issue of procedural due process was not raised until after oral argument in the Oregon Court of Appeals by a Memorandum of Supplemental Authority and in the Oregon Supreme Court Petition for Review and at oral argument. The gist of the argument was that no person has had the opportunity to historically test the factual predicates of Thornton's sua sponte conclusions that the use of the dry-sand beaches satisfies the English common law of ancient custom and therefore the retroactive application of Thornton to Plaintiffs' land is a denial of due process. While the issue of deprivation of procedural due process was raised sufficiently to preserve it on appeal, in the opinion of only two justices, it was not addressed by either of Oregon's appellate courts. For res judicata to apply the issue must be decided. The Court of Appeals dealt with the question in

footnote 2 with the following circular comment:

> "Plaintiffs argue that their interest, acquired in 1957, predated the decision in State ex rel Thornton v. Hay, supra, and is, therefore, senior to the public rights recognized in that case. However, the date of the decision is not relevant. Rather, the question is when, under the reasoning of Hay, the public is that that must [have] occurred long before 1957." Stevens v. City of Cannon Beach, 114 Or App 457, 459 n.2 (1992).

The Oregon Supreme Court mentioned the retroactive effect of Thornton as follows:

> Plaintiffs further argue that, because they acquired their property before this court's 1969 decision in Thornton, the rule from Thornton may not be applied retroactively to them.
>
> The date of the Thornton decision is not relevant. Rather, the question is when, under Thornton's reasoning, the public rights came into being. The answer is that that [sic] they came into being long before plaintiffs acquired any interest in their."
> Stevens v. City of Cannon Beach, 317 Or 131, 136 (1993).

As has been made clear in Yee v. City of Escondido, 118 L. Ed. 153, 169 (1992), the preservation of an issue on

appeal has two components, i.e., the issue must be raised and must be addressed by the lower court. Similarly, the same criteria apply to res judicata. ORS 43.130(2); Van De Hay v. U.S. National Bank, 313 Or 86, 92, 829 P.2d 695 (1992).

One will search the state court's opinions in vain to find reference to deprivation of procedural due process.

Second: Where there has been a fundamental shift in the law following the first decision so as to make the application of claim preclusion unfair it will not be applied. Blackledge v. Harrington, 219 Or 691, 634 P.2d 243 (1981).

A. Issue Preclusion v. Claim Preclusion.

The Restatement of Judgments 2d provides that "A judgment in favor of either the plaintiff or the defendant is conclusive, in a subsequent action between them on the same or a different claim, with respect to any issue actually litigated and determined if its determination was essential to that judgment." Restatement of Judgments 2d section 17(3).

The Restatement refers to Section 27, which deals with issue preclusion--the effect of a judgment in precluding relitigation of an issue when litigation of the claim is not precluded by the doctrines of merger or bar. Section 27, titled Issue Preclusion--General Rule, provides that "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim."

B. Oregon Law of Preclusion.

Under Oregon law, claim preclusion, or res judicata, bars relitigation of the same claim if 1) the same claim was or should have been litigated in the prior litigation; 2) final judgment ruled on the claim; and 3) after litigation on the merits. Rennie v. Freeway Transport, 294 Or 319, 323-324, 656 P.2d 919, 921 (1982) (en banc); Matter of Compensation of Hopson, 53 Or App 109, 114, 631 P.2d

342, 345 (1981); Stone v. Beneficial Standard Life Insurance Co., 273 Or 594, 542 P.2d 892 (1975). Issue preclusion, or collateral estoppel, on the other hand, bars relitigation of an issue when the following elements are present: 1) the issue of fact or issue of mixed fact and law is identical to such issue as was already decided; 2) the decision on the identical issue was necessary to the prior judgment; and 3) the party against whom the preclusion is sought had a full and fair opportunity to litigate the issue. Bahler v. Fletcher, 257 Or 1, 4, 474 P.2d 329, 331 (1970) (en banc); State v. Johnson, 70 Or App 403, 405, 689 P.2d 1032, 1033-1034 (1984); Blackledge v. Harrington, 291 Or 691, 634 P.2d 243 (1981). Neither claim nor issue preclusion will be applied if to do so would constitute manifest injustice outweighing society's right to finality and ultimate repose of litigation. Lewis v. International Business Machines Corp., 393 F. Supp. 305, 307-308 (DC Or 1974); State Farm Fire & Casualty Co. v.

Century Home Components, Inc., 275 Or 97, 105, 550 P.2d 1185, 1189 (1976).

C. Exceptions to Preclusion.

Oregon case law recognizes two principal exceptions to the application of either issue or claim preclusion, even when the elements of those defenses are met: first, the party against whom preclusion is sought must have had a full, fair opportunity to litigate the issue in the prior litigation, State Farm Fire & Casualty Co. v. Century Home, supra; second, where substantive facts or contextual law has changed between the earlier judgment and the second litigation, making imposition of preclusion unfair, it will not be applied, Montana v. U.S., 440 U.S. 147, 164 n.11, 98 S. Ct 970, 979 n.11 (1979). Preclusion may be particularly inapposite where there has been a major change in constitutional principles as applied to areas of continuing conduct that have broad public importance. See, e.g., Griffin v. State Board of Education, 296 F. Supp 1178 (E.D.

Va. 1969) (second suit on racially discriminatory system of state school tuition grants held not barred by first suit when Supreme Court in the interim had struck down a similar system in a different case); Christian v. Jemison, 303 F.2d 52, 55 (5th Cir. 1962), cert. denied, 371 U.S. 920 (decision upholding local bussing ordinance not res judicata to subsequent trial on that issue due to momentous change in constitutional law after first suit).

D. Application of Preclusion Under Fair Faith and Credit Act.

Under the Full Faith and Credit Act, 27 U.S.C. Section 1738, a federal court is required to give the same preclusive effect to a state court judgment as another court of the state would give. Allen v. McCurry, 449 U.S. 90, 96, 101 S. Ct. 411, 415 (1980). A federal court must determine the preclusive effect of a state court ruling by applying a two-part analysis: 1) reference to state law; and 2) even if state law should require preclusion, evaluation of whether

the party against whom the earlier court decision is sought to be asserted did not have a full and fair opportunity to litigate the claim or issue decided by the first court. Id. at 449 U.S. at 104, 101 S. Ct. at 419-420; see also Marrese v. American Academy of Orthopedic Surgeons, 470 U.S. 373, 380, 105 S. Ct. 1327, 1332 (1985) (state preclusion law applied "subject to the requirements . . . of the Due Process Clause"). The United States Supreme Court has held that the second prong of the Full Faith and Credit preclusion analysis is especially important in Section 1983 cases:

> Moreover, additional exceptions to [res judicata and] collateral estoppel may be warranted in Section 1983" that "the federal courts could step in where the state courts were unable or unwilling to protect federal rights."

Haring v. Prosise, 462 U.S. 306, 313-314, 103 S. Ct. 2368, 2373 (1983) (citations omitted). Thus, even in instances where a state's preclusion law would foreclose a subsequent suit, federal courts are authorized to disregard otherwise

applicable state rules of law if such are inconsistent with the federal policy underlying Section 1983. Robinson v. Ariyoshi, 753 F.2d 1468, 1472 (9th Cir. 1985) (preclusive effect will not be given to a state court judgment where the state court demonstrated inability or unwillingness to protect federal rights).

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IRVING C. STEVENS and JEANETTE E. STEVENS,	)	
Plaintiffs-Appellants,	)	C.A. No. 95-35837
v.	)	U.S.D.C. 95-455-FR
CITY OF CANNON BEACH and STATE OF OREGON, acting by and through its DEPARTMENT OF PARKS AND RECREATION, DIVISION OF STATE LANDS, LAND CONSERVATION AND DEVELOPMENT COMMISSION, and JUDICIAL DEPARTMENT,	)	
Defendants-Appellees.	)	

BRIEF OF APPELLANTS IRVING C. AND JEANETTE E. STEVENS

Appeal from the United States District Court for the District of Oregon

Honorable Helen J. Frye, District Court Judge

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2. DUE PROCESS WAS NOT AFFORDED THE STEVENS IN THEIR STATE CASE OR BEFORE THE DISTRICT COURT.

a) There is no factual record to support the application of the doctrine of custom to Oregon's dry sand beaches or to plaintiffs' land as *Lucas* required.

Thornton's adoption of the doctrine of custom as a legal foundation for a public recreational easement over Oregon's dry sand beaches, from the Columbia River to the California border, was by a *sua sponte* decision with no supporting factual record, briefs, or arguments before the supreme court that rendered the decision. The sole purpose for adopting the doctrine was to avoid tract-by-tract litigation. These unique facts caused two commentators, at the time, to question whether *Thornton* could apply to pre-*Thornton* non-party beach owners without violating

constitutional due process guarantees.[13]

The absence of a record in *Thornton*, justifying the application of the English doctrine of custom, prevents any other court from assessing the factual record deemed sufficient to satisfy the doctrine of custom. The absence of a record supporting application of the doctrine in *Thornton* was compounded in the *Stevens* case. The Stevens state case necessarily attacked the application of the doctrine of custom to

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[13] One commentator observed that:

> "The obvious question is how the Oregon Supreme Court in the *Thornton* decision can agree with the plaintiffs that the Beach Bill alone cannot 'divest a person of his rights in land' but find that the Beach Bill and the English doctrine of custom together can do so?...[Other owners] have not had their day in court. ... To so hold, as the court did in *Thornton*, seems to take property in violation of Fifth and Fourteenth Amendments. The argument can be made that the holding violates proper procedure since the other property owners were not before the court to litigate their rights." Delo: *English Doctrine of Custom in Oregon Property Law: State ex rel Thornton v. Hay*, 4 Env. L.Rev. 383 (Spring 1974); *see also Note*, 22 Stanford L.Rev. 564 (1970).

their property. Because the *Stevens* complaint was dismissed for failure to state claim by reason of *Thornton,* the Stevenses were deprived of a record in their case establishing the pretextual nature of the doctrine and its inapplicability to their land. Nor could the Stevenses have distinguished proof of public use in their case from that in *Thornton's* factual record of public use because none existed in *Thornton.*

Justices Scalia and O'Connor's dissent noted that in both *Thornton* and the *Stevens* case, the absence of a factual record to support the pre-existence of the doctrine of custom prevented the U.S. Supreme Court from undertaking its duty to: "reexamine the *evidentiary basis* on which those conclusions are founded." ___ U.S. at ___ 114 s.Ct. At 1335, 127 L.Ed.2d at 683. Thus the absence of a record in *Stevens* barred review of the Stevenses' takings claim, even though the Oregon Supreme Court's announcement that the doctrine existed as a background principle of Oregon common law before the Stevenses bought the property, was of "questionable constitutionally." ___ U.S.

____, 114 S.Ct. at 1335, 127 L.Ed.2d at 682. Justices Scalia and O'Connor also noted that their reading of *Thornton, supra, McDonald, supra,* and *Stevens, supra,* reinforced sense "that the [Oregon} court is creating the doctrine rather than describing it." ____ U.S. ____, 114 S.Ct. at 1335 n.4, 127 L.Ed.2d at 682 n.4.

However, Justices Scalia and O'Connor found that the *Stevenses'* procedural due process claim was viable:

> Particularly in light of the utter *absence of record in support for the crucial factual determinations in ... [Thornton],* whether the Oregon Supreme Court [in *Stevens*] chooses to treat it [the *Thornton* decision] as having established a "custom" applicable to Cannon Beach alone, or one applicable to all dry sand beach in the state, *petitioners must be afforded an opportunity to make out their constitutional claim by demonstrating that the asserted custom is pretextual.* ____ U.S. ____, 114 S.Ct. at 1336, 127 L.Ed.2d at 684 (emphasis added).

b) **The District Court violated the *Lucas* rule in granting dismissal based upon claim preclusion.**

Plaintiffs' § 1983 procedural due process claim in the federal court was met by yet another set of motions to dismiss.

The dismissal was based upon the argument that Plaintiffs sought to re-litigate their Fifth Amendment takings claim, which was barred by the claim preclusive effect of their state proceedings.

The District Court's dismissal was erroneous, because a Fifth Amendment takings claim and a procedural due process claim under the Fourteenth Amendment are different claims and different rules apply. Procedural due process complains of a lack of a fair procedure concerning constitutionally protected liberty, equality or property interests. *Zinermon v. Burch,* 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990). The lack of fair procedure, in and of itself, is actionable, and damages for actual injury are assessable from such denial of fair procedure, whether or not a taking of a constitutional interest actually occurred. *Carey v. Piphus,* 435 U.S. 247, 98 S.Ct. 1042, 55

L.Ed.2d 252 (1978).[14]

The District Court's Opinion lumps together the Federal complaint's due process claim and the state court's decision on the Fifth Amendment takings claim. The Opinion does not address the Oregon Supreme Court's assertion in *Stevens* that *Thornton* merely enunciated one of Oregon's 'background principles of ... the law of property' ..." 317 Or at 143, 854 P.2d at 456. Nor does the Opinion mention the Supreme Court's problematic citation of *Hay v. Bruno,* 344 F.Supp 286 (D.Or. 1972) as authority for its "background principle" proposition.

Hay v. Bruno, supra is not sound authority for the proposition that *Thornton's* enunciated doctrine of custom and

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[14] *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982), *Lucas v. South Carolina Coastal Council, supra; Moore v. City of Costa Mesa,* 886 F.2d 260, 262 (9th Cir. 1989); *Sinaloa Lake Owners Association v. City of Simi Valley,* 882 F.2d 1398, 1405-06 (9th Cir. 1989) *cert. den.* 485 U.S. 1016 (1990). *Hall v. City of Santa Barbara,* 833 F.2d 1270, 1274 (9th Cir. 1986), *cert. den.* 485 U;.S. 940 ( ); overruled on other grounds: *Yee v. Escondido,* ___ U.S. ___ 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992).

was a pre-existing background principle of Oregon's law of real property. The Federal District Court in *Hay v. Bruno* did not state that Thornton identified the doctrine of custom as a background principle of the state's law of real property. To the contrary, all *Hay* stated was that the preservation of dry sand beaches in Oregon was not an unforesecable *result* of the case. *Hay* distinguished *Hughes v. State of Washington*, 389 U.S. 290, 8 S.Ct. 438,19 L.Ed.2d 530 (1967) wherein the Supreme Court reversed the Washington Supreme court, which court had suddenly overruled a prior contrary case affecting tide-lands to arrive at its decision, because of the unforeseeable nature of the reversal. The District Court then merely stated that the result of beach preservation for public recreation was a foreseeable *result*:

> "There was no unpredictable *result* here. The action of the Supreme Court of Oregon was consistent with and is supported by a number of decisions from other jurisdictions which confirm the right of a state under similar circumstances to protect and preserve its beaches for the benefit of the people. See, *Marks v. Whitney*, 6 Cal.3d 251, 98 Cal. Rptr. 790, 491 P.2d 374 (1971)." 344 F.Supp at 2896 (emphasis added)

Marks v. Whitney, supra cited by the District Court, above, was a case upholding the State of California's interest in tide lands, not dry-sand lands, based upon the theory of lands held in public trust, not pursuant to custom.

Finally, the District Court's Opinion does not address the lack of a record of the predicate facts regarding the public's use of the Stevenses' land, necessary for the application of the doctrine to their land. As earlier stated, *Lucas* requires a factual record establishing the application of the background principle supporting the taking to the land in question. The mere pronouncement that the right (in this case the right to exclusive possession) didn't exist is insufficient, citing *Webb Fabulous Pharmacies Inc. v. Beckwith,* 449 U.S. 155, 164, 101S.Ct. 446, 432, 66 L.Ed.2d 358 (1980). *Lucas, supra* 505 U.S. __ 112 S.Ct. at 2901, 120 L.Ed.2d 823.

Instead of undertaking the required analysis, the District Court dealt with the procedural due process claim summarily, in the final paragraph of its opinion by observing:

> To the extent that Irving and Jeanette Stevens seek to state a new or different claim that they were deprived of their right to due process of law because the state court disposed of the taking claim on a motion to dismiss without an evidentiary hearing, this claim is barred by the doctrine of *res judicata.* The full record of procedure used by the trial court and the Oregon Court of Appeals was before the Oregon Supreme Court. In addition, these same procedural facts were before the United States Supreme Court when the petition for a writ of certiorari was denied. The Stevenses had a full and fair opportunity to present any and all issues relating to any claim that the procedure followed was not adequate. The Oregon Supreme Court has determined that there was no taking within the meaning of the Oregon or United States Constitutions. This determination, even if erroneous, operates to preclude consideration of this issue and all other issues which could have been asserted in the state court action. See, *Palomar Mobilhome Park Ass'n v. City of San Marcos*, 989 F.2d at 365. E.R. 5 pp 11-12, Doc. No.21.

However, the Fifth Amendment taking claim was not the issue. The issue before the Court was the absence of any *evidentiary basis* to support the doctrine of custom's existence prior to the Stevenses' acquisition of title and proof of the doctrine's application to their land.

Thus, without any evidentlary basis in support thereof, the District Court's opinion accepts the Oregon Supreme Court's circular conclusions that the *Thornton* case enunciated a background principle of Oregon's property law, and that the doctrine applied to the Stevenses' property. Without saying so, the District Court assumed the Supreme Court's holding fully satisfied the *Lucas* case. The Opinion simply ignores the dissenting opinions of Justices Scalia and O'Connor concerning the lack of a record in support of the state court's conclusions, which conclusion was deemed of "questionable constitutionality" 114 S.Ct. at 1335, 127 L.Ed.2d at 682. This treatment of plaintiffs' federal court case leaves the due process issue raised In the federal complaint totally unanswered; *i.e.:* Did the dismissal of plaintiffs state court complaint by applying claim preclusive effect to the earlier *ipse dixit* decree of *Thornton* deny plaintiffs procedural due process?

Clearly, the District Court erred in accepting the Oregon Supreme Court's conclusion in the Stevenses' state case, that

Thornton's ipse dixit adoption of custom in 1969 inhered in Plaintiffs' title, as part of the state's law, in 1957, when Plaintiffs took title. By its unquestioned acceptance, the District Court gave full faith and credit to a state court decision that directly flaunts the rule set forth in *Lucas*.

A district court may not give preclusive effect to a state decision when the procedures used by the lower court directly conflict with procedural due process rights, such as those guaranteed by *Lucas*. *See Hanson v. Denckla*, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958). The result of the dismissal below, Is the deprivation of the Stevenses' property without due process; exactly the result prohibited in *Lucas* and warned against by Justices Scalia and O'Connor, who stated in the Stevens dissent, that the Stevenses "must be afforded an opportunity to make out their constitutional claim by demonstrating that the asserted custom is pretextual." 505 U.S. __ 114 S.Ct. at 1336, 127 LEd. at 684.

(c) The District Court erred by ignoring other exceptions to the application of claim and issue preclusion recognized by the Supreme Court.

Additional reasons for reversal of the dismissal exist. The Supreme Court in *Allen v. McCurry*, 449 U.S. 90 101 S.Ct. 441, 66 L.Ed.2d 308 (1980), quoting *Monroe v. Pape*, 365 U.S. 167,173-74, 81 S.Ct 473, 5 LEd.2d 492 (1978), held that, in passage of 28 U.S.C. 1983, Congress

> "'. . . intended a federal remedy in three circumstances: where state substantive law was facially unconstitutional, where state procedural law was inadequate to allow full litigation of a constitutional claim, and where state procedural law, though adequate in theory, was inadequate in practice. . . .'" *Id.* at 100-101,101 S.Ct. at 66 L.Ed.2d at 317.

The Stevens' submit that the dismissal of their state taking claim was an inadequate procedure "in practice." Further that the state court failed to acknowledge the due process principle they relied upon contrary to *Allen,* that stated:

"This understanding of 1983 might well support an

> exception to res judicata and collateral estoppel where state law did not provide for procedures for the litigation of constitutional claims or where a state court failed to even acknowledge the existence of the constitutional principle on which a litigant based his claim." 14. at p. 101, 101 S.Ct. at 66 L.Ed.2d at 317.

Another specific instance in which a federal court is not required to give full faith and credit, pursuant to 28 U.S.C. § 1738, to a state court decision is when the state court decision impermissibly applied issue or claim preclusion in the proceeding before it from another, separate case, when the parties before the court were not parties or in privity with parties in the earlier decision ostensibly furnishing the basis for the preclusion. See *Hansberry v. Lee*, 311 U.S. 32 61 S.Ct. 115, 85 L.Ed.2d (1940). In *Hansberry* the U.S. Supreme Court ruled that a federal court should not give full faith and credit to a state court judgment which had given a *res judicata* effect to an earlier state court judgment not involving an identity of parties or persons in privity, e.g., *Griffen v. Griffen*, 327 U.S. 220, 228-29 66 S.Ct. 556, 560, 90 L.Ed. 635, 640 (1945). *Accord:*

Brown v. Ticor Title Insurance Co., 982 F.2d 386 (9th Cir. 1992), *cert. den.* __ U.S. _ 114 S.Ct. 1359,128 L.Ed.2d 33 (1994).

In the instant case, the District Coun's dismissal gave full faith and credit to the *Stevens* case even though the *Stevens* judgment of dismissal gave claim preclusive effect to *Thornton*, to which the Stevenses were not parties, but which judgment deprived them of their property, 12 years after they acquired it! The *Stevens* judgment was not entitled to full faith and credit under the authority of *Hansberry v. Lee, supra.*

A third distinct exception to the application of full faith and credit or issue/claim preclusion exists in the federal courts, when a state court decides an issue by relying upon a federal standard. *Delaware v. Prouse*, 440 U.S. 648, 652-53 99 S.Ct. 1393 L.Ed.2d 635, 640 (1979); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 368, 97 S.Ct. 2849, 2853-54 53 L.Ed.2d 915, 971-72 (1977).

In the *Stevens* state case, the Oregon Supreme Court

assumed, without deciding, that the federal taking standard would apply in an analysis of the Oregon Constitution by stating in footnote 5 of its opinion:

> "(5) Because plaintiffs have not made a separate argument under the state Constitution, we will assume for purposes of this case, without deciding, that the analysis would be the same under the Oregon Constitution. See, *Dept. of Trans. v. Lundberg*, 312 Or. 568, 572, 572 n. 4, 825 P.2d 641 (1992) (stating principle)." 317 Or. 135, n. 5, 854 P.2d at 451, n. 5.

The court then turned to the federal standard In such takings cases announced in the *Lucas* case to determine *Lucas'* effect upon the Stevens case and the earlier *Thornton* case. It concluded, without a record before it in either case, that custom was a background principle of the state's property law.

Therefore, as was noted by this Court, in *Katz v. Children's Hospital of Orange County*, 28 F.3d 1520, 1529 n. 9 (9th Cir. 1994), a federal court has a duty to verify the constitutional analysis undertaken in a state court using federal standards for its judgment. No such analysis was undertaken by the District Court. Instead, the Oregon Supreme Court's assertion

that *Thornton* was a background principle of Oregon's common law of property in 1957 -- without one citation to a state case so holding -- remained unexamined by the District Court. Furthermore, in light of the absence of an evidentiary record in *Thornton* or *Stevens* the District Court could not have examined the evidentiary basis forming the conclusional fact that the doctrine applied to Plaintiffs' property.

These circumstances alone, under *Lucas*, mandate that a court must examine -- for the first time since *Thornton's* adoption of the doctrine of custom in 1969 -- the evidentiary basis for the assertion that the doctrine was in place in the State's common law prior to 1969 and, furthermore, in this case, that the public's use satisfied the doctrine's elements as to plaintiffs' property. Because there is no evidentiary record in either the *Stevens* case or the *Thornton* case an evidentiary hearing was required in the lower court.

B. THE DISTRICT COURT ERRED BY MISAPPLYING THE ELEMENTS OF CLAIM PRECLUSION AND ISSUE PRECLUSION AS GROUNDS TO DISMISS PLAINTIFFS' PROCEDURAL DUE PROCESS COMPLAINT.

1. CLAIM PRECLUSION

Claim preclusion was not a proper ground for dismissal of Plaintiffs federal court complaint.

The federal court complaint below was dismissed upon the ground of claim preclusion. The applicable claim preclusion statute in Oregon provides in part:

> The effect of a judgment ... in an action, suit or proceeding before a court or judge of this state or of the United States, having jurisdiction is as follows: (1) ....
>
> "(2) In other cases, the judgment, decree or order is, in respect to the matter directly determined, conclusive between the parties, representatives and their successors in interest by title subsequent to the commencement of the action, suit or proceeding, litigating for the same thing, under the same title and under the same capacity." ORS 43.130.
>
> Any cause of action available under the facts is included

in claim preclusion analysis. *See Dean v. Exotic Veneers*, 271 Or. 188, 194, 531 P.2d 266 (975). Thus, the claim must be one that could have been joined in the earlier action by seeking an additional or alternate remedy and be directly determined by judgment.

The Plaintiffs' state court complaint was limited to a claim for a facial and applied takings under the Fifth and Fourteenth Amendments of the United States Constitution and under Article I § 18 of the Oregon Constitution. No claim or cause of action for denial of procedural due process was made in plaintifft' complaint, Nor could one have been made, because administrative procedures followed by the City and State were in compliance with local and state law.

It was not until the State's motion to dismiss the Stevenses' takings complaint was granted that the issue of being deprived of the right to factually contest the application of the *Thornton* doctrine of custom arose. However, the denial of procedural due process, by the State of Oregon's dismissal of the

takings complaint, did not create, at that time, a cause of action or claim against the State for the constitutional tort of denial of due process. That claim, or cause of action, had to await appellate court review, setting aright, the dismissal of the complaint. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985).

Thus the District Court's use of claim preclusion to dismiss plaintiffs' procedural due process claim was inappropriate.

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IRVING C. STEVENS and JEANETTE E. STEVENS,	)
Plaintiffs-Appellants,	) C.A. No. 95-35837
v.	) U.S.D.C. 95-455-FR
CITY OF CANNON BEACH and STATE OF OREGON, acting by and through its DEPARTMENT OF PARKS AND RECREATION, DIVISION OF STATE LANDS, LAND CONSERVATION AND DEVELOPMENT COMMISSION, and JUDICIAL DEPARTMENT,	)
Defendants-Appellees.	)

REPLY BRIEF OF APPELLANTS IRVING C. AND JEANETTE E. STEVENS

Appeal from the United States District Court for the District of Oregon

Honorable Helen J. Frye, District Court Judge

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The Respondents confuse raising a constitutional issue, sufficient for appeal purposes, with the existence of a separate actionable claim or "cause of action" not being raised. The Stevens raised the issue of lack of procedural due process in the state courts if *Thornton* was applied to their property retroactively. However, the cause of action of denial of procedural due process did not arise until the Oregon courts did apply *Thornton* to the Stevens land without affording the Stevens an opportunity to contest its existence, as a background principle of Oregon's law of real property, prior to the *Thornton* case and to contest the degree of the public use sufficient to satisfy the doctrine, if a trial court found it to have pre-existed *Thornton.*

No one can doubt that, had the trial court denied the motion to dismiss, a summary judgment motion, following discovery, would have occurred, thereby affording Plaintiffs' an opportunity, through exhibits, affidavits, and deposition

testimony to prove the pretextual nature of the doctrine of custom; thereby affording the Stevens due process of law. Similarly, had either of the Oregon appellate courts remanded for such a hearing on a summary judgment proceeding, or at trial, on a factual record concerning the existence of the doctrine as a background principle of Oregon's law of property prior to *Thornton v. Hay* and required the State to prove facts of public use sufficient to satisfy that doctrine, the due process issue would have disappeared. Respondents don't, nor can they, argue that the Stevens could have stated a claim of lack of procedural due process at the outset. It was only after each of Oregon's state courts ignored the issue, that a cause of action for denial of due process arose.

Oregon's law is absolutely clear that a "claim" or "cause of action," used in the context of *res judicata* analysis, is "'an aggregate of operative facts giving rise to a right or rights termed 'right' or 'rights of action' which will be enforced by the courts.'" *Dean v. Exotic Veneers, Inc.*, 271 Or 188, 192, 531

P.2d 266, 269 (1975), citing *Clark on Code Pleading,* 472-78 (2d ed. 1947). A "claim" or "cause of action" for denial of due process arises only after exhaustion of remedies provided by the state, *Zinermon v. Burch,* 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990). In *Zinermon,* the Supreme Court made clear that a due process claim does not arise at the time of the deprivation. The Court stated:

> "The Due Process Clause also encompasses a third type of protection, a guarantee of fair procedure. A § 1983 action may be brought for a violation of procedural due process, but here the existence of state remedies is relevant in a special sense. In procedural due process claims, the deprivation by state action of a constitutionally projected interest in 'life, liberty or property' is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law. *Parratt,* 451 U.S. at 537; *Carey v. Piphus,* 435 U.S. 247, 259. **** The constitutional violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process. Therefore, to determine whether a constitutional violation has occurred it is necessary to ask what process the State provided, and whether it was constitutionally adequate. ****" *Id.* U.S. at 1256-26, 110 S.Ct. At 983, 108 L.Ed.2d at 114. *Accord: Norco Construction, Inc. v. King*

> *County,* 801 F.2d 1143 (9th Cir. 1986): A procedural due process claim is not actionable until planning authorities and state review entities make final determinations.

Thus, the Stevens' due process claim didn't exist until *certiorari* was denied by the U.S. Supreme Court. The "claim" or "cause of action" of denial of due process, not having arisen in the state court proceedings, it could not have been raised. Consequently, as a result of the due process claim not having been available to be litigated in the state court proceedings, the critical element of claim preclusion -- "claim raised or should have been raised" -- in the federal court is missing. Therefore, claim preclusion doesn't apply to this case.

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BEFORE THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IRVING C. STEVENS and JEANNETTE E. STEVENS,	)	
Plaintiffs-Appellants,	)	
vs.	)	
	)	C.A. No. 95-35837
CITY OF CANNON BEACH and STATE OF OREGON, acting by and through its Department of Parks and Recreation, Division of State Lands, Land Conservation and Development Commission, and Judicial Department,	)	**ORAL ARGUMENT**
Defendants-Appellees.	)	

TRANSCRIPT ON APPEAL

BE IT REMEMBERED That the above-entitled matter came on regularly for hearing before the Court of Appeals for the Ninth Circuit, at Portland, Oregon, on January 9, 1997, and the following represents a transcript of the electronically recorded proceedings of said matter.

JUDGE'S PANEL:

JUDGE ALDISERT
JUDGE THOMAS
JUDGE PREGERSON

APPEARANCES OF COUNSEL:

GARRY P. McMURRY
Attorney at Law appearing for Petitioners

STEPHANIE STRIFFLER
Assistant Attorney General/Appellate Attorney
Department of Justice appearing for Appellees
State of Oregon

No appearance by City of Cannon Beach

JUDGE PREGERSON: ... vs. City of Cannon Beach.

MR. McMURRY: If it please the Court and Counsel, I'm Garry McMurry, appearing for Appellant. As the Court knows this case was dismissed by the Court below on the sole ground of issue pre -- I'm sorry, claim preclusion, res judicata. That is to say that plaintiffs did raise or could have raised the lack of due process, procedural due process in their state inverse condemnation takings claim alleging in addition procedural due process. That's error for three principal reasons.

The first is that the United States Supreme Court has consistently held that a procedural due process claim does not arise until the State has been afforded, through appeals, the opportunity to grant the process due that was allegedly not granted in the court below. In other words, deprival is not actionable until the State or County or City has been afforded the opportunity to afford a process that is

due. And, of course, Cleveland v. Board of Education vs. Laudermill, cited in the brief, and Zinermon --

JUDGE PREGERSON: Are you suggesting that procedural due process not raised in the state proceeding?

MR. McMURRY: Procedural due process as an issue -- as an issue -- was raised, and I'll get to that point in -

JUDGE PREGERSON: Well, it was --

JUDGE ALDISERT: If it was raised, why wouldn't claim for preclusion -- we know it was raised because that was the subject of Justice Scalia's dissent from certiorari.

MR. McMURRY: It was -- yes, it was raised as a --

JUDGE ALDISERT: And he was joined by Justice Ginsburg, wasn't he?

MR. McMURRY: It was joined by Justice O'Connor.

JUDGE ALDISERT: Justice O'Connor.

MR. McMURRY: Yes. Let me come to that point, though, Your Honor. This Court --

JUDGE ALDISERT: I mean, we're talking -- I think your whole argument has to be in the context of claim preclusion. And when you're starting out with procedural due process, I'm submitting to you that clearly it was raised in the state proceeding, and if it wasn't -- if it was raised then why talk about that issue?

MR. McMURRY: Because, Your Honor, the issue in the case before the Federal District Court was the claim of denial of procedural due process in the state courts. So the question was: Was a claim for procedural due process litigated in the prior case? That's the reason.

Now, as this Court has noted in Dodd v. Hood River County, Judge Aldisert writing the opinion joined by Judge Noonan, dissenting by Judge Tang, in 1995, the Oregon claim preclusion law was stated as follows correctly: Quote, "A plaintiff who has prosecuted one action against a

defendant and obtained a valid judgment is barred by res judicata from prosecuting another action against the same defendant where (a) the claim in the second action is one which is based on the same factual transaction as was at issue in the first." That may or may not apply in this case because procedural due process arises out of the trial itself and not for the taking by the State. But be that as it may.

"(b) The plaintiff seeks a remedy additional or alternative to the one sought earlier." Clearly that applies.

But "(c) The claim is of such a nature as could be -- could have been joined in the first action." The procedural due process claim could not have been joined or made a separate suit in the state proceeding at any time up until the Supreme Court denied certiorari making the Supreme Court of Oregon's decision final.

The Court went on in the --

JUDGE PREGERSON: So are you saying that really what you're talking to us about is like a different

brand of procedural due process?

MR. McMURRY: The issue -- the issue was argued in the state court that if Thornton was applied retroactively to the Stevens property which was purchased 12 years before the Thornton decision, an issue of due process would arise because Thornton was the first enunciation of custom at creating an easement. That issue was raised in the Court of Appeals; that issue was raised in the Supreme Court; that issue was raised in the U.S. Supreme Court.

Now, what due process was due the plaintiffs in the state court proceeding? The due process that was mandated by Lucas v. South Carolina Coastal Council which is that when a state converts private to public property or passes a rule --

JUDGE ALDISERT: Counsel, I hate to interrupt you, but when you are talking about Thornton coming down, that this was taken 10 years before Thornton, right?

MR. McMURRY: Yes.

JUDGE ALDISERT: You're not talking about procedural due process, are you? You're talking about substantive due process.

MR. McMURRY: No, Your Honor, because the mandate --

JUDGE ALDISERT: You are talking about "I am being deprived of property without due process of law." You're not talking about procedural due process which talks about a remedy, a hearing, an opportunity to present that. Now, clearly the issue that you are talking about now about Thornton was raised. Really? Wasn't it?

MR. McMURRY: The issue was raised, Your Honor, but a claim --

JUDGE ALDISERT: And you were saying it can't apply to us because for the first time the Oregon Supreme Court said that this sandbar -- what do you call it? -- a sandy

-- what do you call it?

MR. McMURRY: Dry sand beach.

JUDGE ALDISERT: -- dry sand beach was public property because of custom, going back to William Blackstone's definition of custom. And -- and you're saying this is just dirty pool; you cannot hold us to ten years before a decision, and that's -- that's plain unvarnished substantive due process.

MR. McMURRY: But, Your Honor, the question that we raised in the court below was Lucas mandated in 19 -- Lucas mandated, after oral argument in the Court of Appeals, that in any case of a categorical taking, i.e., a physical invasion --

JUDGE ALDISERT: But Lucas -- I'm interrupting you because we're limited with time here -- Lucas says that the State cannot divest title once it's given, but Thornton says you never had title.

MR. McMURRY: Yes.

JUDGE ALDISERT: And that is how the Supreme Court of Oregon distinguished Lucas.

MR. McMURRY: Yes, Your Honor, but the due process that Lucas now imposes on those types of taking issues is two-fold. One, that there is a logical antecedent inquiry required wherein the proponent of the taking must establish that there preexisted, as a background, well-found principal of law, property or nuisance, a basis, a foundation upon which the present proscription lay, so that a person who buys property would not have a reasonable expectation to exclusive possession or the ability. And that duty is upon the proponent, and it is required as a matter of factual record for the antecedent precedent to sustain a taking without compensation. And the case was remanded to South Carolina for that very purpose.

Similarly in Oregon, in McDonald v. Halverson, 1959, the Oregon Court backed down from Thornton's broad-brush application ipso facto of custom to all the

beaches in Oregon by saying -- by saying -- "where there is no evidence that the proponent puts forward of prior recreational use sufficient to satisfy the custom of Thornton -- as enunciated in Thornton, other rules apply." And they --

JUDGE ALDISERT: But now let's -- no, let's not mix apples and oranges there. They talk -- they did talk about -- what's that magic word? -- sandy --

MR. McMURRY: Dry sand beach.

JUDGE ALDISERT: -- dry sand beach. They were talking about the cove and the cove that was not dry sand beach; that cove had rocks and things, and said -- if I remember the language of that case that says, "We do not detract one word from Thornton. It applies. It applies. But it only applies to this dry sand beach and not to this cove."

This case here is the same dry sand beach that was in Thornton, is it not?

MR. McMURRY: Yes, but, Your Honor, there was another basis for their ruling, and they said specifically

there was a fact that was missing -- the factual predicate to apply custom where there is no evidence of prior recreational use sufficient to satisfy it. Now, the --

JUDGE THOMAS: Okay, I think we understand your argument, Counsel. My question here in the limited time: To what extent did you raise the issue of the fact that you were precluded a hearing in the prior litigation?

MR. McMURRY: Well, we raised it in our briefs when we raised the application of Lucas. We raised it in our brief to the Supreme Court as there will be a due process problem arising because we were not granted an evidentiary hearing, and Lucas demands it. Therefore, to avoid that, if you make Lucas prospective, the problem disappears.

That's what we tried to do, being politically aware that the Court is very married to Thornton, and we tried to accomplish that purpose. But there was no question. The issue was raised, but we had no cause of action which is what claim preclusion is all about.

Thank you.

JUDGE PREGERSON: Thank you. Rebuttal?

MS. STRIFFLER: May it please the Court Stephanie Striffler for the Appellees.

The claims in this case are directly based on the same permit denial that was at issue in the state case. And it's clear under Palomar and general principals of res judicata that those issues cannot be raised again.

What Mr. Stevens attempts to do here is to say "I have a different kind of claim that's not the same claim that was raised in the state court case." And to the extent that he raises a claim about the procedure that the state court used to decide his case, res judicata still applies because it's a matter that either was or could have been raised in the state court proceeding. And in any event, the District Court did not have jurisdiction to review that procedure because of the Feldman doctrine.

As I -- as we see it, this Court has two alternative

ways to view the state court process. Either the plaintiffs raised this issue and it was rejected, and if that is what happened, then clearly he can't bring that claim in federal court because it's already been decided in the state court process. Or he didn't raise it. Then the question is whether he could have.

In fact, one of the issues in front of the U.S. Supreme Court was whether or not he did. But there's no reason why he could not have. As soon as the State said, in the trial court in its motion to dismiss, "You're out of luck here because under Thornton you did not have a property right to take," as soon as the state court said that, there's no reason why the plaintiffs couldn't say, "Wait a minute; that's not fair to apply Thornton to me. It would violate my procedural due process for you to apply Thornton to me on a motion to dismiss without giving me a hearing."

JUDGE THOMAS: So we can never hear a procedural due process claim, correct? Because you can

always say, when you've been denied procedural due process, unless it's in the final instance, that that would completely eliminate a remedy under your theory, correct?

MS. STRIFFLER: No. It may eliminate a Federal District Court remedy for this particular litigant, but another litigant may be able to come into federal court and say, "Look at how screwed up the Oregon state laws are, and this Stevens case has demonstrated that," and then we would get into an argument about whether Oregon law was clearly established that way.

But this litigant can't make that claim because he's had his opportunity to do so.

JUDGE THOMAS: Let's assume -- with slightly different facts, let's assume that the Stevens had gone back and had -- because, as we look at the factual predicate here, they applied for a permit and it was denied on a number of grounds. I think they found 10 out of 12 grounds that they didn't qualify for building the sea wall, if memory serves.

And the Court, if I also recall, saying that single family dwellings were allowed; beach front protective structures were allowed, and therefore it wasn't a complete taking under Lucas if I'm understanding this correctly.

MS. STRIFFLER: That's correct.

JUDGE THOMAS: Let's assume that the Stevens go back, and they defer all of the defects in the permitting process. They say, "We've met all 10 or 12 requirements, and we have a seawall ready to erect here." Do you think that that claim would then, if they bring it here, would be proper?

MS. STRIFFLER: They -- they would --

JUDGE THOMAS: If you say no, you don't get a hearing.

MS. STRIFFLER: Pardon?

JUDGE THOMAS: Go ahead, answer my question.

MS. STRIFFLER: Well, their takings case would

have -- they would have to pursue in state court before they would have a federal takings claim. But conceivably they might have a procedural due process claim if they could -- if they could establish that it was futile to raise the claim in the state court process. And then, as I said, we would have an argument over that. But they could probably come into federal court and say, look at this, the state court is not going to let us prove our case. But --

JUDGE THOMAS: So even now the Stevens can go back and make a new permit and start anew?

MS. STRIFFLER: Possibly. I don't know what impediments there might be with respect to the permitting process.

In any case, what Mr. Stevens says is that he could not have raised this claim because he did not have a claim until the Oregon Courts denied him a right to a hearing. That's where I'm saying he had to have asked for a hearing, and he had to have asked for a hearing in front of the trial

court. Perhaps if he had, and if he'd asked for it in the way that he eventually did in the Oregon Supreme Court or the U.S. Supreme Court, maybe he would have had the hearing that he wanted. But he can't argue that it was denied until he asks.

If his claim is as he's discussing it here, which is that the Lucas decision had a certain effect on the Thornton case and a property owner's rights, or a lack of them, under the Thornton case, then, as we've discussed, he clearly raised that in the Oregon appellate courts after the Lucas decision came down, and it was clearly addressed by the Oregon appellate courts.

What he's saying now is simply doesn't like what the Oregon appellate courts said about Lucas. That's not something that this Court can review. And he got his federal review of that claim by taking it to the U.S. Supreme Court, and he lost. And that's where we are.

Now, he also --

JUDGE ALDISERT: But he has had --

MS. STRIFFLER: Pardon?

JUDGE ALDISERT: I'd like you to help me out here -- I don't think he had a -- Mr. McMurry had a chance to develop it because we were peppering him with questions all the time. Now, Ms. Striffler, he made the argument that he couldn't have raised the procedural due process until the final decision of the Oregon Supreme Court. And the way I analyzed that was that he was arguing almost a substantive due process on the way to the Oregon Supreme Court, but he was -- the issue of procedural due process was not ripe until the decision.

Did you understand that argument?

MS. STRIFFLER: That's what I understand him to be saying.

JUDGE ALDISERT: All right. Would you develop it? How do you respond?

MS. STRIFFLER: Well, as I understand what he's

saying he was relying on Zinermon v. Burch for that proposition, and that's not what Zinermon says. What Zinermon is ordinarily, to bring a 1983 case, you have to exhaust your -- ordinarily, to bring a 1983 case, you don't have to exhaust your state remedies. In fact, we don't even look at what the State does. You have an independent ability to come into federal court. Except where what you're talking about is a procedural due process case, then we will look at what the state court remedy is. It doesn't say that we will require you to take your state court process all the way through. It says you can come into federal court and say this state court process isn't good.

It doesn't say that a litigant who has already been through the state court process and has had the opportunity to raise this federal claims can then come again into federal court and say, "I don't like how the state court looked at my federal claims." And if you look at the Allen v. McCurry case and the Migra v. City of Warren case, both of those

cases say, "We presume that state courts understand the federal constitution and can apply them, and due process is satisfied by your ability to seek review of those state court decisions in the U.S. Supreme Court."

That's exactly what Mr. Stevens did here, and he's pursued his case all the way through, and that should be the end of it.

JUDGE THOMAS: It does put him in a Catch-22, doesn't it? It seems to me that his argument is as phrased, that the reason for that particular requirement is that you want to afford the State the opportunity to provide procedural due process, and that it wasn't a claim that he was making that he was violating proce -- due process -- his due process procedure rights were violated. He wasn't seeking monetary damages. He was saying, "Please correct this defect." And that the claim for damages for violation of the procedural due process or whatever relief he's seeking isn't ripe until the final word which is, "No, we're not going

to correct the defect."

Now, under your theory, anytime there's a procedural due process violation, if a litigant doesn't raise it at that time, they're barred from forever raising it in federal court. And if they do raise it in state court, and the state court finds against them that their federal court review is barred. So my conclusion is that we can never review a procedural due process claim under your theory.

MS. STRIFFLER: Well, that's what I tried to respond to before by saying that it may be that some litigant could come into federal court and say the state court procedures don't work. And the cases under Feldman discuss that kind of claim.

But in a particular case, a litigant who has already pursued his claim and had the opportunity to raise his objections to the state court process, that's correct, cannot get review of that in federal District Court. They get federal review of it; their federal review of it is in the U.S. Supreme

Court.

JUDGE THOMAS: So is it your view that an objection to procedural due process is the same as a claim for a remedy of violation of procedural due process?

MS. STRIFFLER: You mean an objection --

JUDGE THOMAS: He's coming into court claiming, under 1983, and other statutes say, damages for violation of procedural due process. He didn't assert that claim in the state court --

MS. STRIFFLER: That's --

JUDGE THOMAS: He objected to the procedure that was being used.

MS. STRIFFLER: Well, that's debatable --

JUDGE THOMAS: Is it your --

MS. STRIFFLER: -- whether he did or not, but go ahead.

JUDGE THOMAS: Well, no, he didn't -- there's no -- he didn't plead under this theory anyway.

MS. STRIFFLER: Right.

JUDGE THOMAS: You could say he had the facts. Is it your view that an objection in the state court proceeding is equivalent to a claim for relief?

MS. STRIFFLER: Well, let's put it this way: It's a prerequisite to a claim for relief. It's not necessarily the same. But if it's not the same, then under Mr. Stevens' theory, if what he has to do is ask the state court for his hearing, then his case isn't ripe until he's asked and been denied, then maybe his case isn't ripe until he's gone to the state court and said, "Take care of me."

JUDGE THOMAS: So you're arguing that he has to -- well, his argument is it's not ripe. And you're saying it is ripe -- was ripe -- now, tell us why.

MS. STRIFFLER: It was ripe because he had the opportunity to ask for a hearing, and he had the opportunity to get appellate review of that request. If he didn't take that opportunity then it's correct: it wasn't ripe. If he did take

that opportunity, then the process for getting review of that was through the state court appellate review, and then through seeking certiorari in the U.S. Supreme Court which is what he did. And under the cases which we've cited, that satisfies his constitutional rights. That process.

In summary, Mr. Stevens either raised his issue and he lost it or he didn't raise the issue and he could have. Either way he can't relitigate his case in this court. He's had his opportunity. Thank you.

JUDGE PREGERSON: All right, thank you.

MR. McMURRY: The Oregon Court is absolutely clear that the Dodd case sets forth the rule that a claim has to be extant and enforceable to be a claim within claim preclusion. There was no such right claim to be tried.

The argument to the contrary confuses raising it -- preserving an issue on appeal with that of having a cause of action. And the Catch-22 is a bar whichever way you fly it and it was alluded to by Judge Aldisert in the Dodd opinion.

The argument made by the State in that case and this case are the same: Close the doors. The State will take care of due process as well as takings to the damage.

Now, the final -- the final point we wish to make is the simple fact that you cannot have claim preclusion on a cause of action that would not be recognized in the State of Oregon. The State has never argued that we could have tried a case, we could have filed a case after the case was tried in Oregon and the Supreme Court's opinion became final. We could file a claim in Oregon. Number one, they don't have a due process clause to their constitution, but even under the federal case, they would say that case has been decided. So we're stuck under Oregon's interpretation by the State Attorney General which is contrary to the mandate of Lucas and the law as set forth in Zinermon v. Burch.

Thank you.

JUDGE PREGERSON: Very well. Thank you.

(Off the record)

JUDGE ALDISERT: ... of counsel on this last case. Were either of you involved in the Thornton-Hay case?

MS. STRIFFLER: No.

JUDGE ALDISERT: The lead article in the latest Columbia Law Review talks about custom being resuscitated, and I brought it along with me. It's over in my hotel room; with the schedule we had this week, I didn't have a chance to open it. But apparently it was written by the former counsel in the Thornton --

MR. McMURRY: Alterman?

JUDGE ALDISERT: He's a professor somewhere. Are either of you familiar with the article?

MS. STRIFFLER: No.

MR. McMURRY: No, I haven't seen it yet.

JUDGE ALDISERT: I commend it to you because this -- of course, we are very much interested in Thornton

because it was authored by our distinguish colleague, Judge Goodwin, who was then a Justice of the Supreme Court of Oregon; now he's a member of our Court. But actually it was, in a sense, a very revolutionary decision --

MR. McMURRY: Indeed.

JUDGE ALDISERT: -- applying the old English law of custom to --

MR. McMURRY: Could that be Hans Linde, the author?

JUDGE ALDISERT: No, no, it was an attorney. It was an attorney and associate professor.

MR. McMURRY: All right.

JUDGE ALDISERT: It's in the latest edition of the Columbia Law Review. It's a leading article.

MR. McMURRY: Thank you, Your Honor; I'll look at it.

JUDGE PREGERSON: Thank you.

(Concluded)

DECLARATION OF TRANSCRIBER

I, Patricia Morgan, of Morgan Verbatim, Inc., hereby certify that:

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(B) that I personally transcribed the electronic recording of the proceedings had at the time and place hereinbefore set forth;

(C) that the foregoing pages, consisting of pages 1 through 20, represent an accurate and complete transcription of the entire record of the proceedings, as requested, to the best of my belief and ability.

WITNESS my hand at Oregon City, Oregon this 5th day of March, 1997.

/s/
Patricia Morgan
Official Transcriber

Argued and submitted June 24, affirmed August 5, reconsideration denied September 23, petition for review allowed December 22, 1992 (315 Or 271)
See later issue Oregon Reports

Irving C. STEVENS
and Jeanette Stevens,
Appellants,

v.

CITY OF CANNON BEACH
and State of Oregon,
Department of Parks & Recreation,
Respondents.

(90-2061; CA A68916)

835 P2d 940

Owners of vacant lots in dry sand area of city brought inverse condemnation action alleging that denial of application for permits to build sea wall constituted uncompensated taking. The Circuit Court, Thomas E. Edison, J., dismissed claims, and owners appealed. The Court of Appeals, Buttler, P. J., held that denial of applications took nothing from owners because their property interests never included development rights that could interfere with public's use of dry sand area.

Affirmed.

Eminent Domain – Nature, extent, and delegation of power – What constitutes a taking; police and other powers distinguished – Relating to waters or water courses

Denial of landowners' application for permits to build sea wall as part of eventual development of vacant lots in dry sand area of city for motel or hotel use was not uncompensated taking within meaning of Oregon or United States Constitutions; owners' property interests never included development rights that could interfere with public's use of dry sand area. Or Const, Art I, § 18; US Const, Amend V.

CJS, Eminent Domain § 13.

Appeal from Circuit Court, Clatsop County.

Thomas E. Edison, Judge.

Garry P. McMurry, Portland, argued the cause for appellants. With him on the briefs was Garry P. McMurry & Assoc., Portland.

Jack L. Landau, Deputy Attorney General, Salem, argued the cause for respondent State of Oregon. With him on the brief were Dave Frohnmayer, Attorney General, and Virginia L. Linder, Solicitor General, Salem.

William R. Canessa and Campbell, Moberg & Canessa, P.C., Seaside, filed the brief for respondent City of Cannon Beach.

Keith A. Bartholomew, and Interns, Michael Clinton and Carrie Stilwell, Portland, filed a brief *amicus curiae* for 1000 Friends of Oregon, League of Women Voters of Oregon and Oregon Shores Conservation Coalition.

Before Buttler, Presiding Judge, and Rossman and De Muniz, Judges.

BUTTLER, P. J.

Affirmed.

BUTTLER, P. J.

Plaintiffs own two vacant lots in the dry sand area of the city of Cannon Beach (city). They applied to defendants city and Oregon Department of Parks & Recreation (department) for permits to build a seawall as part of the eventual development of the lots for motel or hotel use. City and department denied the applications on a number of grounds.

Plaintiffs then brought this inverse condemnation action, asserting that city's and department's decisions, and the regulations on which they are based, constitute uncompensated takings of plaintiffs' property, in violation of the Fifth Amendment to the United States Constitution and Article I, section 18, of the Oregon Constitution. Defendants moved to dismiss the taking claims. Relying on *State ex rel Thornton v. Hay*, 254 Or 584, 462 P2d 671 (1969), the trial court allowed the motions and explained that the denial of the applications took nothing from plaintiffs, because their property interests have never included development rights that could interfere with the public's use of the dry sand area.[1] Plaintiffs appeal, and we affirm.

Although plaintiffs argue otherwise, the trial court's reading and application of *State ex rel Thornton v. Hay, supra*, were correct. In that case, the Supreme Court reasoned that the public had acquired the right to use the dry sand area of Cannon Beach under the "doctrine of custom." That right was held to be superior to the rights of owners[2] of property in the area, insofar as they sought to use it in ways that could obstruct or interfere with the public's use. The court explained:

> "The disputed area is *sui generis*. While the foreshore is 'owned' by the state, and the upland is 'owned' by the patentee or record-title holder, neither can be said to 'own' the full bundle of rights normally connoted by the term 'estate in fee simple.' * * *

[1] Plaintiffs then voluntarily dismissed their remaining claim, which sought relief other than compensation for a taking.

[2] Plaintiffs argue that their interest, acquired in 1957, predated the decision in *State ex rel Thornton v. Hay, supra*, and is therefore senior to the public rights recognized in that case. However, the date of the decision is not relevant. Rather, the question is when, under the reasoning of *Hay*, the public rights came into being, and the answer is that that must occurred long before 1957.

"* * * * *

"The rule in this case, based upon custom, is salutary in confirming a public right, and at the same time it takes from no man anything which he has had a legitimate reason to regard as exclusively his." 254 Or at 591, 599.

See also McDonald v. Halvorson, 308 Or 340, 780 P2d 714 (1989).

In short, under the Supreme Court's decision in *Hay*, plaintiffs have never had the property interests that they claim were taken by defendants' decisions and regulations. The question before *this* court, therefore, is necessarily very narrow. We must follow the Supreme Court's decision unless, as plaintiffs argue, that decision constitutes a taking in itself and is contrary to United States Supreme Court decisions applying the Takings Clause of the Fifth Amendment.

After oral arguments in this case, the United States Supreme Court decided *Lucas v. South Carolina Coastal Council*, 505 US ___, 112 S Ct 2886, 120 L Ed 2d 798 (1992). The Court said:

"Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."[3] 505 US at ___, 120 L Ed 2d at 820. (Footnote omitted.)

The opinion makes it clear that that issue is to be decided under the "State's law of property and nuisance." ___ US at ___, 120 L Ed 2d at 821.

State ex rel Thornton v. Hay, supra, is an expression of state law that the purportedly taken property interest was not part of plaintiffs' estate to begin with. Accordingly, there was no taking within the meaning of the Oregon or United States Constitutions. The trial court did not err by dismissing the taking claims.

Given the basis for our holding, we do not reach the parties' other arguments.

Affirmed.

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[3] We assume for purposes of discussion, but do not decide, that defendants' actions would deprive plaintiffs of all economically beneficial use of the lots.

IN THE SUPREME COURT OF THE STATE OF OREGON

Irving C. and Jeanette STEVENS,
Petitioners on Review,

v.

CITY OF CANNON BEACH
and State of Oregon,
Department of Parks & Recreation,
Respondents on Review.

(CC 90-2061; CA A68916; SC S39585)

In Banc

On review from the Court of Appeals.*

Argued and submitted March 3, 1993.

Garry P. McMurry, of Garry P. McMurry & Associates, Portland, argued the cause and filed the petition for petitioners on review.

Michael D. Reynolds, Assistant Attorney General, Salem, argued the cause for respondents on review State of Oregon, Department of Parks and Recreation. With him on the response were Theodore R. Kulongoski, Attorney General, and Virginia L. Linder, Solicitor General. With Jack L. Landau, Deputy Attorney General, on a response were Charles S. Crookham, Attorney General, and Virginia L. Linder, Solicitor General, Salem.

No appearance for respondent on review City of Cannon Beach.

Keith A. Bartholomew, Portland, filed a brief for *amici curiae* 1000 Friends of Oregon, League of Women Voters of Oregon, and Oregon Shores Conservation Coalition.

VAN HOOMISSEN, J.

The decision of the Court of Appeals and the judgment of the circuit court are affirmed.

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* Appeal from Clatsop County Circuit Court, Thomas E. Edison, Judge. 114 Or App 457, 835 P2d 940 (1992).

VAN HOOMISSEN, J.

Plaintiffs appeal a trial court's judgment dismissing their complaint for inverse condemnation for failure to state a claim. ORCP 21A(8). Plaintiffs own two vacant lots in the dry sand area of the City of Cannon Beach (city).[1] They applied to defendants city and Oregon Department of Parks and Recreation (department) for permits to build a seawall as part of the eventual development of the lots for motel or hotel use. City and department denied the application on a number of grounds.

Plaintiffs then brought this inverse condemnation action, alleging that defendants' denials, and the ordinances and rules on which they were based, resulted in a taking of plaintiffs' property, in violation of Article I, section 18, of the Oregon Constitution, and the Fifth Amendment of the United States Constitution. Defendants moved to dismiss plaintiffs' complaint, pursuant to ORCP 21A(8). Relying on *State ex rel Thornton v. Hay*, 254 Or 584, 462 P2d 671 (1969) (*Thornton*), the trial court allowed defendants' motions. The Court of Appeals affirmed. *Stevens v. City of Cannon Beach*, 114 Or App 457, 835 P2d 940 (1992). For the reasons that follow, we affirm the decision of the Court of Appeals.

Plaintiffs are the owners of two vacant ocean front lots in Cannon Beach, which have been improved by construction of streets and provision of utilities. Although the lots are zoned for residential or motel use, parts of them are subject to city's Active Dune and Beach Overlay zone. That zoning implements a portion of the Land Conservation and Development Commission's (LCDC) Statewide Goal 18, which limits "residential developments and commercial and industrial buildings on beaches, and on active foredunes, and other foredunes which are conditionally stable and that are subject to ocean undercutting or wave overtopping." Zoning Ordinance of Cannon Beach 79-4A, § 3.180. Parts of plaintiffs' lots also are within the dry sand area of the beach, as defined by

[1] For the purposes of this case, we will refer to the land below the ordinary high tide line as the "wet sand area" and the land above the ordinary high tide line but below the vegetation line as the "dry sand area." The disputed land at issue in this case is dry sand area.

the Oregon Beach Bill (Beach Bill). ORS 390.605 *et seq.*[2] Any person who wants to make an improvement on any property subject to ORS 390.640 must obtain a permit from the department. ORS 390.650.

Plaintiffs applied to city for a conditional use permit to build the seawall. City denied plaintiffs' application, in part because city found that the eventual proposed commercial use of the property conflicted with LCDC Goal 18.[3] Plaintiffs also applied to department for a permit to build the seawall within the dry sand area of the beach. ORS 390.650. That permit also was denied.[4]

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[2] ORS 390.605 provides in part:

"As used in ORS 390.610 * * *:

"* * * * *

"(2) 'Ocean shore' means the land lying between extreme low tide of the Pacific Ocean and the line of vegetation as established and described in ORS 390.770."

ORS 390.615 provides:

"Ownership of the shore of the Pacific Ocean between ordinary high tide and extreme low tide, and from the Oregon and Washington state line on the north to the Oregon and California state line on the south, excepting such portions as may have been disposed of by the state prior to July 5, 1947, is vested in the State of Oregon, and is declared to be a state recreation area. No portion of such ocean shore shall be alienated by any of the agencies of the state except as provided by law."

[3] Plaintiffs' application to city also failed to satisfy a number of criteria for a conditional use permit. City's findings of fact state: that the design of the proposed seawall was not based on findings of a geologic site investigation, as required by city's comprehensive plan; that the proposed seawall conflicted with Flood Hazard Policy 3, because the calculated 100-year velocity flood would overtop the proposed seawall by 4.9 feet, which could result in damage to structures located behind the seawall; and that plaintiffs had failed to demonstrate that other higher-priority methods of erosion control (such as maintenance or planting of vegetation) would not be effective to stabilize the shoreline and that therefore the seawall (the lowest priority stabilization method) was required.

[4] Plaintiffs' application to department also failed to satisfy a number of criteria for a permit. Department's findings of fact state: that plaintiffs had not demonstrated erosion in the area that required a new seawall; that they had not demonstrated the need for new motel units in the city; that they had failed to obtain the permit required by ORS 196.810 for fill removal; that the proposed seawall would obstruct the view; that the seawall would remove 12,500 feet of dry sand area used extensively for public recreation; that recreational access would be impaired; that the seawall would present an escape route obstacle to beach users (particularly to senior citizens and others whose mobility is impaired); that neighboring property and land in front of the seawall could be subject to accelerated erosion; and that the proposed design did not protect on-shore property from wave overtopping and the 100-year flood.

Plaintiffs then brought this inverse condemnation action against defendants, alleging that city's denial of a permit is a taking of private property for a public purpose, in violation of Article I, section 18,[5] and the Fifth Amendment (an "as applied" taking), and that city's Zoning Ordinance 79-4A, implementing LCDC Goal 18, on its face, is an unconstitutional taking of private property for a public purpose ("facial" taking).[6]

Plaintiffs further alleged that department's denial of a permit is an unconstitutional "as applied" taking of their property and that department's rules implementing LCDC Goal 18 are an unconstitutional "facial" taking. Plaintiffs also claimed that compliance with other technical requirements for the proposed seawall could not result in the award of the permits and that, therefore, they had pursued all available means of relief with defendants.

Defendants filed ORCP 21A(8) motions to dismiss against plaintiffs' complaint, arguing that plaintiffs' takings allegations failed to state ultimate facts sufficient to constitute claims. The trial court granted defendants' motions with prejudice, citing *Thornton, supra*. The court explained that defendants' denials took nothing from plaintiffs, because plaintiffs' property interests in the lots never have included development rights that could interfere with the public's use of the dry sand area.[7] Accordingly, the court entered judgment for defendants.

In the Court of Appeals, plaintiffs argued that the trial court erred in holding that *Thornton* precluded any development of the dry sand area of their property. The Court

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[5] Because plaintiffs have not made a separate argument under the state constitution, we will assume for purposes of this case, without deciding, that the analysis would be the same under the Oregon Constitution. *See Dept. of Trans. v. Lundberg*, 312 Or 568, 572, 572 n 4, 825 P2d 641 (1992) (stating principle).

[6] *See* Annot, *Supreme Court's View As To What Constitutes "Taking" Within Meaning of Fifth Amendment's Prohibition Against Taking of Private Property For Public Use Without Just Compensation*, 89 L Ed 2d 977 (1988).

[7] Plaintiffs then voluntarily dismissed without prejudice a final claim for *de novo* review of department's denial of the permit. ORS 390.658 provides in part:

> "Any person aggrieved by the decision of the State Parks and Recreation Department under ORS 390.650 is entitled to petition the circuit court of the county where the property is located for a judicial review, de novo as in equity, of the action or failure to act by the department."

of Appeals disagreed and affirmed, quoting *Thornton*:

> " 'The disputed area [dry sand area] is *sui generis*. While the foreshore is "owned" by the state, and the upland is "owned" by the patentee or record title holder, neither can be said to "own" the full bundle of rights normally connoted by the term "estate in fee simple." * * *
>
> " '* * * * *
>
> " 'The rule in this case, based upon custom, is salutary in confirming a public right, and at the same time it takes from no man anything which he has had a legitimate reason to regard as exclusively his.' 254 Or at 591, 599." *Stevens v. City of Cannon Beach, supra*, 114 Or App at 459-60.

The court also noted that the recent decision of the Supreme Court of the United States in *Lucas v. South Carolina Coastal Council*, 505 US ___, 112 S Ct 2886, 120 L Ed 2d 798 (1992) (*Lucas*) did not require a different result. *Ibid.* Accordingly, the court concluded that the trial court did not err in dismissing plaintiffs' taking claims.

On review,[8] plaintiffs argue that the Court of Appeals' decision in this case conflicts with the recent decision of the Supreme Court of the United States in *Lucas v. South Carolina Coastal Council, supra*. Plaintiffs further argue that, because they acquired their property before this court's 1969 decision in *Thornton*, the rule from *Thornton* may not be applied retroactively to them.[9] Finally, plaintiffs argue that the trial court and the Court of Appeals incorrectly interpreted *Thornton* as having superseded and canceled *all* development rights of private owners on the dry sand area of city, thus impliedly repealing the provisions of the Beach Bill that allow *some* development.[10] Plaintiffs do not ask this

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[8] During oral argument in this court, plaintiffs asked this court to take judicial notice of three instances where, according to plaintiffs, dry sand areas within the state of Oregon have been developed. We decline to do so. Under the Oregon Evidence Code, a court may take judicial notice of an adjudicative fact if it is generally known within the jurisdiction or if it is "[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." OEC 201(b). Plaintiffs' proposed facts fit neither of those categories.

[9] The date of the *Thornton* decision is not relevant. Rather, the question is when, under *Thornton*'s reasoning, *the public rights came into being*. The answer is that that they came into being long before plaintiffs acquired any interests in their land.

[10] Plaintiffs make several other assignments of error, most of which are subsumed by our framing of the main issue in this case. The others do not merit discussion.

court to overrule *Thornton*, and they do not argue that any portion of the Beach Bill is unconstitutional.

Defendants respond that, because *Lucas* holds that where the state seeks to sustain regulation that deprives land of all economically beneficial use, the state may resist compensation if the "proscribed use interests" were not part of the owner's title to begin with, *Lucas, supra*, 120 L Ed 2d at 820, *Lucas* comports with *Thornton*. Defendants argue that, because under the state property law doctrine of custom, the proscribed use interests in this case were not part of plaintiffs' title, there is no taking under *Lucas*.

Defendants further respond that, if the rule from *Thornton* could not be applied where the customary use by the public interfered with any economically beneficial uses by the dry sand area owners, *Thornton* would be severely limited. *Thornton*, defendants argue, did not create a new legal principle, but merely applied an existing legal principle of easement by custom grounded in Oregon's property law. Therefore, defendants argue, application of *Thornton* in the present case is not retroactive, any more than it was in *Thornton*. *See Hay v. Bruno*, 344 F Supp 286, 289 (D Or 1972) (rejecting argument that Oregon Supreme Court's decision in *Thornton* was a sudden change in state property law that therefore effected a taking of the property at issue in *Thornton*).

Amici curiae 1000 Friends of Oregon, the League of Women Voters of Oregon, and the Oregon Shores Conservation Coalition have submitted briefs on behalf of defendants, at both trial and appellate levels in this case. They argue that *Lucas* does not apply to the present case, because the regulations in question do not prevent "all economically beneficial use" of plaintiffs' property.[11]

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[11] *Amici curiae* also set forth an interesting alternative analysis of this case, arguing that the public trust doctrine may provide a common-law source of protection of Oregon's beaches for use by the public. The public trust doctrine analysis, more in line with the specially concurring opinion of Justice Denecke in *Thornton*, has been followed in several jurisdictions. *See, e g., Matthews v. Bay Head Imp. Assn*, 95 NJ 306, 471 A2d 355, *cert den* 469 US 821 (1984) (privately owned dry sand areas come under the umbrella of the public trust); *National Audubon Soc. v. Superior Court*, 33 Cal 3d 419, 189 Cal Rptr 346, 658 P2d 709, *cert den* 464 US 977 (1983) (landowners who purchase property subject to public trust do not state takings claims); *see also* Pitts, *The Public Trust Doctrine: A Tool for Ensuring Continued*

The parties recognize, and we agree, that *Thornton* is directly on point. The issue, therefore, is the viability of *Thornton's* rule of law in the light of *Lucas*. We therefore begin with a discussion of *Thornton*.

The facts in this case and in *Thornton* are remarkably similar. In each case, the landowners wished to enclose the dry sand area of their Cannon Beach properties, thereby excluding the public from that portion of the ocean shore. In *Thornton*, this court held that the state could prevent such enclosures because, throughout Oregon's history, the dry sand area customarily had been used by the public:

> "The dry-sand area in Oregon has been enjoyed by the general public as a recreational adjunct of the wet-sand or foreshore area since the beginning of the state's political history. The first European settlers on these shores found the aboriginal inhabitants using the foreshore for clam digging and the dry-sand area for their cooking fires. The newcomers continued these customs after statehood. Thus, from the time of the earliest settlement to the present day, the general public has assumed that the dry-sand area was a part of the public beach, and the public has used the dry-sand area for picnics, gathering wood, building warming fires, and generally as a headquarters from which to supervise children or to range out over the foreshore as the tides advance and recede. In the Cannon Beach vicinity, state and local officers have policed the dry sand, and municipal sanitary crews have attempted to keep the area reasonably free from man-made litter.
>
> "Perhaps one explanation for the evolution of the custom of the public to use the dry-sand area for recreational purposes is that the area could not be used conveniently by its owners for any other purpose. The dry-sand area is unstable in its seaward boundaries, unsafe during winter storms, and for the most part unfit for the construction of permanent structures." *Thornton, supra*, 254 Or at 588-89.

In *Thornton*, while noting that the common law of prescriptive easements also could apply, *id.* at 593-95, this court relied instead on the common law doctrine of custom to support its holding that the landowners could be prevented from excluding the public from the dry sand areas of the

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Public Use of Oregon Beaches, 22 Envt'l L 731 (1992). Because of our disposition of this case on other grounds, we do not reach this argument.

ocean shore:

> "The most cogent basis for the decision in this case is the English doctrine of custom. * * * An established custom * * * can be proven with reference to a larger region [than could a prescriptive easement]. * * *
>
> "The other reason which commends the doctrine of custom over that of prescription as the principal basis for the decision in this case is the unique nature of the lands in question. This case deals solely with the dry-sand area along the Pacific shore, and this land has been used by the public as public recreational land according to an unbroken custom running back in time as long as the land has been inhabited.
>
> "* * * * *
>
> "Finally, in support of custom, the record shows that the custom of the inhabitants of Oregon and of visitors in the state to use the dry sand as a public recreation area is so notorious that notice of the custom on the part of persons buying land along the shore must be presumed." *Thornton, supra*, 254 Or at 595, 598.

See also McDonald v. Halvorson, 308 Or 340, 780 P2d 714 (1989) (because no factual predicate shown for application of doctrine of custom, general public had no right to access or to use private inland dry sand area); *State Highway v. Fultz*, 261 Or 289, 491 P2d 1171 (1971) (public has used dry sand area between ordinary high tide and vegetation line for recreational purposes since 1889).

As defined in *Thornton*, the common-law doctrine of custom may be paraphrased as follows:

> (1) The land has been used in this manner so long "that the memory of man runneth not to the contrary";
>
> (2) without interruption;
>
> (3) peaceably;
>
> (4) the public use has been appropriate to the land and the usages of the community;
>
> (5) the boundary is certain;

(6) the custom is obligatory, *i.e.*, it is not left up to individual landowners as to whether they will recognize the public's right to access; and

(7) the custom is not repugnant or inconsistent with other customs or laws. *Thornton, supra*, 254 Or at 595-97, (citing Blackstone's Commentaries).

In *Thornton*, this court determined that the historic public use of the dry sand area of Cannon Beach met those requirements.[12] *Thornton, supra*, 254 Or at 596-97; 1 William Blackstone Commentaries 76-78 (1778). *See also McDonald v. Halvorsen, supra*, 308 Or at 359-60 (Oregon common-law doctrine of custom as stated in *Thornton* applies to classic dry

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[12] There is no evidence that the native peoples recognized private ownership of the beach area at the time Europeans first appeared on the scene. Indeed, there was no sovereign who could have granted, enforced, or confirmed any private property rights in the beach areas for many years after the first Europeans arrived. The law of a common area, accessible and usable by all, called "custom," was itself a common part of the legal system accompanying European settlers into the Pacific Northwest. About 1819, the United States and Great Britain agreed to postpone for 20 years settlement of the question of which was sovereign in the Pacific Northwest. Settlement was made by treaty in 1846. *See* Merk, The Oregon Question (1967); Gallatin, The Oregon Question (1846); Twiss, The Oregon Question Examined (1846); Falconer, The Oregon Question (1845); Sturgis, The Oregon Question (1845). In the interim, various franchised private companies of Great Britain may have maintained order of sorts, but themselves provided no source of law. For a brief period, settlers in the Willamette Valley formed an independent government. The Oregon Territory was organized in 1848, and Oregon became a state in 1859.

The early Oregon cases relating to this subject indicate that "the tide lands lying between high- and low-water mark belong to the state." *Bowlby v. Shively*, 22 Or 410, 419, 30 P 154 (1892), *aff'd* 152 US 1, 14 S Ct 548, 38 L Ed 331 (1894), (citing *Parker v. Taylor*, 7 Or 446 (1879)). The Supreme Court's affirmance in that case stated:

> "By the common law, both the title and the dominion of the sea * * * where the tide ebbs and flows, and of all the lands below high water mark, within the jurisdiction of the Crown of England, are in the King. Such waters, and the lands which they cover, either at all times, or at least when the tide is in, are incapable of ordinary and private occupation, cultivation and improvement; and their natural and primary uses are public in their nature * * *." *Shively v. Bowlby, supra*, 152 US at 11.

Although the early cases did not distinguish between dry sand and wet sand areas, this court has noted that the distinguishing line was considered to be "the 'high-water' line, a line that was then assumed to be the vegetation line." *Thornton, supra*, 254 Or at 589. It was not until 1935 that the United States Supreme Court redefined this boundary as extending to the mean high-tide line. *Borax Ltd. v. Los Angeles*, 296 US 10, 22-27, 56 S Ct 23, 80 L Ed 9 (1935). This court has noted that, although *Borax* "may have expanded seaward the record ownership of upland landowners, it was apparently little noticed by Oregonians * * * [and] had no discernible effect on the actual practices of Oregon beachgoers and upland property owners." *Thornton, supra*, 254 Or at 590.

sand areas abutting the ocean, such as Cannon Beach, but not to inland, freshwater cove with no history of customary use by public); Pitts, *The Public Trust Doctrine: A Tool for Ensuring Continued Public Use of Oregon Beaches*, 22 Envt'l L 731, 737 n 40 (1992) (noting other jurisdictions that have adopted the common-law doctrine of custom). We now turn to the determination of what effect the Supreme Court's opinion in *Lucas* has on Oregon's well-established policy of public access to and protection of its ocean shores, as articulated in *Thornton* and the cases following it.

In *Lucas*, the plaintiff purchased two beachfront lots in 1986, for about $1 million, intending to build single-family homes, for which the land was zoned at that time. In 1988, South Carolina passed a Beachfront Management Act, which, in effect, barred Lucas from constructing any habitable structures on the land. The state trial court found that the parcels therefore were rendered valueless by the Act. In *Lucas*, the Supreme Court recounted its regulatory takings jurisprudence, stating again that this area of the law defies clear and objective formulae for decision-making, except in cases of direct physical takings or non-physical takings that clearly deprive the owner of all economic use of the land. *Id.* 120 L Ed 2d at 812-15. The Court stated:

> "Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. This accords, we think, with our 'takings' jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; 'as long recognized, some values are enjoyed under an implied limitation and must yield to the police power.' " *Id.* (footnote omitted) (quoting *Pennsylvania Coal Co. v. Mahon*, 260 US [393,] 413, 43 S Ct 158, 67 L Ed 322 (1922) (new statute that destroyed previously existing property rights was invalid as taking without compensation)).

The *Lucas* Court addressed a state's sudden elimination of all economically valuable use of land without compensation, holding that:

> "Any limitation so severe [as to prohibit all economically beneficial use of land] cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles *of the State's law of property* and nuisance already place upon land ownership." *Id.*, 120 L Ed 2d at 821 (emphasis added).

As an example, the Court explained that the owner of a lake bed would not be entitled to compensation if denied a permit to engage in landfilling if such an activity would have the effect of flooding another's land, even if the effect of the denial was to eliminate the only economically viable use of the land, because it would not have been "previously permissible under relevant property and nuisance principles." *Id.* at 821. Only when a regulation goes beyond what the relevant background principles of state law would dictate must compensation be paid. *Id.* at 822.

The *Lucas* Court then listed other factors to be considered in determining whether a taking has occurred, including: the degree of harm to public lands and resources posed by the owner's proposed activities; the degree of harm to adjacent private property; the social value and suitability of the owner's proposed activity; the ease with which the harm could be avoided; and the uses engaged in by similarly situated owners. *Ibid.* Having described this analysis, the majority remanded the case to the South Carolina courts for a determination under state law as to whether the ills sought to be avoided by the Beachfront Management Act would have been illegal under the common law of private or public nuisance, recognizing that it was unlikely that this would be the case. *Id.* at 822.

Applying the *Lucas* analysis to this case, we conclude that the common-law doctrine of custom as applied to Oregon's ocean shores in *Thornton* is not "newly legislated or decreed"; to the contrary, to use the words of the *Lucas* court, it "inhere[s] in the title itself, in the restrictions that background principles of the State's law of property and nuisance already placed upon land ownership." *Id.* at 821. As noted in *Hay v. Bruno, supra*, 344 F Supp at 289, "there was no

sudden change in either the law or the policy of the State of Oregon. For at least 80 years, the State as a matter of right claimed an interest in the disputed land." Plaintiffs' argument that a "retroactive" application of the *Thornton* rule to their property is unconstitutional, is not persuasive. *Thornton* did not create a new rule of law and apply it retroactively to the land at issue in that case, *Hay v. Bruno, supra*; nor did *Thornton* create a new rule of law as applied to plaintiffs' land here. *Thornton* merely enunciated one of Oregon's "background principles of * * * the law of property." *Lucas, supra*, 120 L Ed 2d at 821. We therefore agree with the Court of Appeals, which concluded that the trial court's reading and application of *Thornton* were correct. 114 Or App at 459.

When plaintiffs took title to their land, they were on notice that exclusive use of the dry sand areas was not a part of the "bundle of rights" that they acquired, because public use of dry sand areas "is so notorious that notice of the custom on the part of persons buying land along the shore must be presumed." *Thornton, supra*, 254 Or at 598. *See also State Highway v. Fultz, supra*, 261 Or at 289 (public use has existed since 1889). We, therefore, hold that the doctrine of custom as applied to public use of Oregon's dry sand areas is one of "the restrictions that background principles of the State's law of property * * * already place upon land ownership." *Lucas, supra*, 120 L Ed 2d at 821. We hold that plaintiffs have never had the property interests that they claim were taken by defendants' decision and regulations.

Plaintiffs, however, do not simply claim that the doctrine of custom is no longer viable after *Lucas*. They also claim that the various statutory schemes that serve to implement that doctrine are unconstitutional. We proceed to examine that claim.

In the years following the *Thornton* case, the Oregon Beach Bill was revised, and the comprehensive land use laws leading to the eventual implementation of LCDC Goal 18 at state and local levels were enacted. Those laws recognized and accommodated the common doctrine of customary use of Oregon's beaches. The Oregon Beach Bill provides in part:

> "(2) The Legislative Assembly recognizes that over the years the public has made frequent and uninterrupted use of the ocean shore and recognizes, further, that where such use

has been legally sufficient to create rights or easements in the public through dedication, prescription, grant or otherwise, that it is in the public interest to protect and preserve such public rights or easements as a permanent part of Oregon's recreational resources.

"(3) Accordingly, the Legislative Assembly hereby declares that all public rights or easements legally acquired in those lands described in subsection (2) of this section are confirmed and declared vested exclusively in the State of Oregon and shall be held and administered as state recreation areas.

"(4) The Legislative Assembly further declares that it is in the public interest to do whatever is necessary to preserve and protect scenic and recreational use of Oregon's ocean shore." ORS 390.610.

In order to implement that policy, the Beach Bill provides that a permit must be obtained for improvements to the ocean shore below the vegetation line (*i.e.*, within the dry sand area of the beach). ORS 390.640(1). An application for such a permit is made to department. After notice and a hearing, and after considering a number of factors, department may approve or deny the permit. ORS 390.650; ORS 390.655. Those factors include:

"(1) The public need for healthful, safe, esthetic surroundings and conditions; the natural scenic, recreational and other resources of the area; and the present and prospective need for conservation and development of those resources.

"(2) The physical characteristics or the changes in the physical characteristics of the area and suitability of the area for particular uses and improvements.

"(3) The land uses, including public recreational use if any, and the improvements in the area, the trends in land uses and improvements, the density of development and the property values in the area.

"(4) The need for recreation and other facilities and enterprises in the future development of the area and the need for access to particular sites in the area." ORS 390.655.

The standards used by department in issuing a permit are further defined in OAR 736-20-005 to OAR 736-20-030, and include:

"In accordance with the Statewide Land Conservation and Development Commission Goal #18 for Beaches and Dunes, permit applications for beachfront protective structures seaward of the beach zone line will be considered only where development existed on January 1, 1977. The proposed project will be evaluated against the applicable criteria included within Goal #18 and other appropriate statewide planning goals." OAR 736-20-010(6).[13]

LCDC Statewide Planning Goal 18 Implementation Requirements, relating to beaches and dunes, include the following:

"(2) Local governments and state and federal agencies shall prohibit residential developments and commercial and industrial buildings on beaches, active foredunes, on other foredunes which are conditionally stable and that are subject to ocean undercutting or wave overtopping * * *. Other development in these areas shall be permitted only if the findings required in (1) above[14] are presented and it is demonstrated that the proposed development:

"a. Is adequately protected from any geologic hazards, wind erosion, undercutting, ocean flooding and storm waves; or is of minimal value; and

"b. Is designed to minimize adverse environmental effects.

"* * * * *

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[13] Other considerations specified in OAR 736-20-005 to OAR 736-20-030 include project need, protection of public rights, compliance with other laws, project modification and other costs, scenic, recreational, and safety concerns, and concerns for other resources such as wildlife. Department made detailed findings regarding all of those considerations, all of which, except concerns for other resources such as wildlife, served as bases for denial of the permit. *See* note 4, *supra*.

[14] Those findings must include:

"a. The type of use proposed and the adverse effects it might have on the site and adjacent areas;

"b. Temporary and permanent stabilization programs and the planned maintenance of new and existing vegetation;

"c. Methods for protecting the surrounding area from any adverse effects of the development; and

"d. Hazards to life, public and private property, and the natural environment which may be caused by the proposed use." LCDC Statewide Planning Goal 18, Implementation Requirements.

The findings accompanying department's denials of plaintiffs' permits satisfy those criteria.

"(5) Permits for beachfront protective structures shall be issued only where development existed on January 1, 1977. Local comprehensive plans shall identify areas where development existed on January 1, 1977. For purposes of this requirement * * *, 'development' means houses, commercial and industrial buildings, and vacant subdivision lots which are physically improved through construction of streets and provision of utilities to the lot and includes areas where an exception to (2) above has been approved.

"The criteria for review of all shore and beachfront protective structures shall provide that:

"a. visual impacts are minimized;

"b. necessary access to the beach is maintained;

"c. negative impacts on adjacent property are minimized; and

"d. long-term or recurring costs to the public are avoided."

Plaintiffs argue that LCDC Goal 18 itself, as implemented by city ordinance, and as relied on by department as one of the criteria that it used in considering whether a permit should be allowed, is unconstitutional, both facially and as applied to their land.

We first address whether the regulations at issue here constitute a facial taking of plaintiffs' land. Plaintiffs argue that, because it prohibits residential developments and commercial and industrial buildings on beaches, LCDC Goal 18 (as codified in both city's ordinance and department's regulations) constitutes a facial taking of their land. In *Dolan v. City of Tigard*, 317 Or 110, 118, ___ P2d ___ (1993), this court stated:

"A land-use regulation does not effect a 'taking' of property, within the meaning of the Fifth Amendment prohibition against taking private property for public use without just compensation, if it substantially advances a legitimate state interest and does not deny an owner economically viable use of the owner's land. *Nollan v. California Coastal Comm'n*, 483 US 825, 835-36, 107 S Ct 3141, 97 L Ed 2d 677 (1987); *Keystone Bituminous Coal Assn. v. DeBenedicitis*, 480 US 470, 495, 107 S Ct 1232, 94 L Ed 2d 472 (1987); *Agins v. City of Tiburon*, 447 US 255, 260, 100 S Ct 2138, 65 L Ed 2d 106 (1980)."

Plaintiffs here do not argue that defendants' denials and the authority on which they rely do not substantially advance a legitimate state interest.

The Supreme Court has stated that plaintiffs "face an uphill battle in making a facial attack on [a statute or regulation] as a taking." *Keystone Bituminous Coal Assn. v. DeBenedictis, supra*, 480 US at 495. In general, "the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary. Adherence to this rule is particularly important in cases raising allegations of an unconstitutional taking of private property." *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 US 264, 294, 101 S Ct 2352, 69 L Ed 2d 1 (1981) (citations omitted).

> "The test to be applied in considering this facial challenge is fairly straightforward. A statute regulating the uses that can be made of property effects a taking if it 'denies an owner economically viable use of his land * * *' " *Id.* (quoting *Agins v. Tiburon*, 447 US 255, 295-96, 100 S Ct 2138, 65 L Ed 2d 106 (1980)).[15]

Plaintiffs argue that the regulation and ordinance deprive them of all economically viable use of their property. It is clear from LCDC Goal 18, however, as well as from the regulations and ordinances at issue here, that what is prohibited is "residential developments and commercial and industrial buildings." Not all economically viable uses of plaintiffs' property falls within that prohibition. Notably, in some circumstances, LCDC Goal 18's implementation requirements appear to allow for single-family dwellings. *See, e.g.*, LCDC Goal 18, Implementation Requirement 4. Moreover, LCDC Goal 18, as well as the rules and ordinances, provides for development of beach front protective structures. Although Implementation Requirement 2, cited by plaintiffs, does prohibit residential developments and commercial and industrial buildings on beaches, Implementation Requirement 5 specifically *allows* beach front protective structures such as seawalls in some circumstances. The provisions of city's Comprehensive Plan and Zoning Ordinance 79-4A, as well as

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[15] *See Agins v. Tiburon*, 447 US 255, 260-61, 100 S Ct 2138, 65 L Ed 2d 106 (1980) ("Although no precise rule determines when property has been taken, the question necessarily requires a weighing of private and public interests").

department's administrative rules (OAR 736-20-005 to 736-20-020) comport with those implementation requirements. *See* notes 3, 4, *supra*. Because LCDC Goal 18 makes provisions for certain economically viable uses of private beaches and dunes, we conclude that city's ordinances and department's administrative rules implementing that goal do not constitute a facial taking of private property.

Turning to plaintiffs' "as applied" challenges, we note that plaintiffs' focus in this case has been their inability to construct a *motel or hotel* on their lots. Implicit in their arguments is the assumption that that is the "economic use" that they have been denied. That assumption, however, is mistaken. Plaintiffs were not denied permits to construct a *motel or hotel* on their lots; rather, they were denied permits to construct a *seawall*. Plaintiffs do not contend that the seawall itself is a residential development or a commercial or industrial building prohibited by the ordinances and rules at issue here. We decline, therefore, to analyze plaintiffs' "as applied" taking claim *as if* a permit to build a motel or hotel had been denied under the LCDC Goal 18 criteria. That simply is not the case.

City's findings of fact state that "the area of the proposed seawall was 'developed' in January 1977. Therefore, beachfront protective structures, such as a seawall, may be permitted." Complaint, Exhibit 1, at 13; *see* LCDC Goal 18 Implementation Requirement 5, quoted *supra*. Thus, plaintiffs' attack on city's ordinances, at best, is indirect, because it is clear that in some circumstances seawalls may be permitted. Plaintiffs rely on city's findings of fact that the purpose of the proposed seawall is "to stabilize and protect private property and that after the construction of the seawall the property *may* be used for commercial purposes." Complaint, Exhibit 1, at 4 (emphasis added).

Only one of city's 14 findings of fact relates to the possible commercial use of the lots; it indicates that the purpose of the proposed seawall was not to minimize an erosion hazard but, rather, to facilitate commercial development in a manner inconsistent with the general prohibition on residential developments and commercial and industrial buildings on beaches. Neither city's findings nor its ordinances suggest that exceptions consistent with the provisions

of LCDC Goal 18 never would be allowed. City's findings show that plaintiffs failed to comply with *10* of city's 14 standards. Nine of those failures to comply were not directly concerned with the possible commercial use of the property. Thus, it is far from clear that meeting the "other technical objections" (as plaintiffs describe those numerous other criteria that their permit applications failed to meet) would not have resulted in city's approval of plaintiffs' conditional use permit to build a seawall.

Department's denial of the permit was based on numerous other criteria as well.[16] See note 4, *supra*. Plaintiffs do not argue that those criteria are unconstitutional. We conclude, therefore, that department's findings regarding the LCDC Goal 18 criteria, flawed though they were, did not necessarily cause the denial of the permit to build a seawall.

The purpose of LCDC Goal 18 is

> "To conserve, protect, where appropriate develop, and where appropriate restore the resources and benefits of coastal beach and dune areas; and
>
> "To reduce the hazard to human life and property from natural or man-induced actions associated with these areas."

Department's administrative rules and city's ordinances at issue in this case serve to mesh the purposes of the common law of custom, the Beach Bill, and LCDC Goal 18.

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[16] The state's denial of the permits to build the seawall was premised on its findings that plaintiffs failed to meet the criteria set forth in OAR 736-20-005 through OAR 736-20-025. Only OAR 736-20-010(6) pertains to the requirements of LCDC Goal 18. In its finding pertaining to this subsection, however, the state erroneously found that no development existed on these lots before January 1, 1977. Complaint, Exhibit 2, at 9. This finding conflicts with city's finding in this regard, as well as the facts as stated in plaintiffs' complaint, which we take as true for purposes of this review. The lots in question were "developed" under the definition provided in LCDC Goal 18 Implementation Requirement 5, because they were "vacant subdivision lots which are physically improved through construction of streets and provision of utilities[.]" We conclude that the state's finding was erroneous, but we are unable to conclude that the error was the reason for denial of the permit in the present case or that compliance with "technical objections" would have been futile.

Had plaintiffs pursued the remedy available for review of department's decision, that error could have been addressed. ORS 390.658. Plaintiffs, however, chose to dismiss their claim under that statute. The fact that review of this issue would have been available under ORS 390.658 certainly undermines plaintiffs' claim that pursuit of other remedies would have been futile.

Because the administrative rules and ordinances here do not deny to dry sand area owners all economically viable use of their land and because "the proscribed use interests" asserted by plaintiffs were not part of plaintiffs' title to begin with, they withstand plaintiffs' facial challenge to their validity under the takings clause of the Fifth Amendment. *Lucas, supra*, 120 L Ed 2d at 820. Moreover, because it is clear that, under the challenged ordinances and regulations, a seawall could be built on plaintiffs' land if the other criteria, not challenged in this case, were met, those sources of law withstand an "as applied" challenge in the present case. We hold that there was no taking of plaintiffs' property within the meaning of the Fifth Amendment. *Lucas, supra*.

The decision of the Court of Appeals and the judgment of the circuit court are affirmed.

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No. 93-496. *STEVENS ET AL. V. CITY OF CANNON BEACH ET AL.* Sup Ct. Oreg. Certiorari denied. Reported below: 317 Ore. 131, 854 P. 2d 449.

JUSTICE SCALIA, with whom JUSTICE O'CONNOR joins, dissenting.

This is a suit by owners of a parcel of beachfront property against the city of Cannon Beach and the State of Oregon. Petitioners purchased the property in 1957. In 1989, they sought a building permit for construction of a seawall on the dry-sand portion of the property. When the permit was denied, they brought this inverse condemnation action against the city in the

Circuit Court of Clatsop County, alleging a taking in violation of the Fifth and Fourteenth Amendments. That court dismissed the complaint for failure to state a claim pursuant to Oregon Rule of Civil Procedure 21A(8), on the ground that under *State ex rel. Thornton v. Hay,* 254 Ore. 584, 462 P. 2d 671 (1969), petitioners never possessed the right to obstruct public access to the dry-sand portion of the property. App. to Pet. For Cert. C-22 to C-25. The Court of Appeals, 114 Ore. App. 457, 835 P. 2d 940 (1992), and then the Supreme Court of Oregon, 317 Ore. 131, 854 P. 2d 449 (1993), both relying on *Thornton,* affirmed. The landowners have petitioned this Court for writ of certiorari to the Supreme Court of Oregon. They allege an unconstitutional taking of property without just compensation, and a denial of due process of law.

In order to clarify the nature of the constitutional questions that the case presents, a brief sketch of Oregon case law involving beachfront property is necessary.

I

In 1969, the State of Oregon brought suit to enjoin owners of certain beachfront tourist facilities from constructing improvements on the "dry-sand" portion of their properties. The trial court granted an injunction. *State ex rel. Thornton v. Hay, supra.* In defending that judgment on appeal to the Supreme Court of Oregon, the State briefed and argued its case on the theory that by implied dedication or prescriptive easement the public had acquired the right to use the dry-sand area for recreational purposes, precluding development. The Supreme Court of Oregon found "a better legal basis" for affirming the decision and decided the case on an entirely different theory:

> "The most cogent basis for the decision in this case is the English doctrine of custom. Strictly construed, prescription applies only to the specific tract of land before the court, and doubtful prescription cases could fill the courts for years with tract-by-tract litigation. An established custom, on the other hand, can be proven with reference to a larger region. Ocean-front lands from the northern to the southern border of the state ought to be treated uniformly," *Id.,* at 595, 462 P. 2d at 676.

The court set forth what it said were the seven elements of the doctrine of custom[1] and concluded that "[t]he custom of the people of Oregon to use the dry-sand area of the beaches for public recreational purposes meets every one of Blackstone's requisites." *Id.*, at 597, 462 P.2d , at 677. The court affirmed the injunction, saying that "it takes from no man anything which he has a legitimate reason to regard as exclusively his." *Id.*, at 599, 462 P.2d at 678. Thus, *Thornton* declared as the customary law of Oregon the proposition that the public enjoys a right of recreational use of all dry-sand beach, which denies property owners development rights.

Or so it seemed until 1989. That year, the Supreme Court of Oregon revisited the issue of dry-sand beach in the case of *McDonald v. Halvorson*, 308 Ore. 340, 780 P.2d 714 (1989). There, the beachfront property owners who were plaintiffs sought a judicial declaration that their property included a portion of dry-sand area adjacent to a cove of the Pacific Ocean. With such a declaration in place, they hoped to gain access (under *Thornton*, as members of the public) to the remaining dry-sand area of the cove lying on property to which the defendants held record title. The State intervened to assert the public's right (under the doctrine of custom) to use the dry-sand area of the cove, and to enjoin defendants from interfering with that right. The Supreme Court of Oregon held that the public had no right to recreational use of the dry-sand portions of the cove beach. 308 Ore., at 360, 780 P.2d, at 724. *McDonald* noted what it called inconsistencies in *Thornton*, 308 Ore., at 358-359, 780 P.2d at 723, and resolved them by stating that "nothing in [*Thornton*] fairly can be read to have established beyond dispute a public claim by virtue of 'custom' to the right to recreational use of the entire Oregon coast." *Id.*, at 359, 780 P.2d, at 724. "[T]here may also be [dry-sand] areas," the court said, "to which the doctrine of custom is

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[1] The Supreme Court of Oregon described the English doctrine of custom as applying to land used in a certain manner (1) so long that the mind runneth not to the contrary; (2) without interruption; (3) peaceably; (4) where the public use has been appropriate to the land and the usages of the community; (5) where the boundary is certain; (6) where the custom is obligatory (not left up to individual landowners as to whether they will recognize the public's right to access); and (7) where the custom is not repugnant to or inconsistent with other customs or laws.

not applicable." *Ibid.*[2] The court noted that "[t]here [was] no testimony in this record showing customary use of the narrow beach on the bank of the cove. . . . The doctrine of custom announced in [*Thornton*] simply does not apply to this controversy. The public has no right to recreational use of the [dry-sand beach area of the cove] because there is no factual predicate for application of the doctrine." *Id.*, at 360, 780 P.2d, at 724.

With *McDonald* now the leading case interpreting the law of custom, petitioners here brought their takings challenge in the Oregon state trial court. As recited above, that court dismissed for failure to state a claim upon which relief could be granted, saying that "[*Thornton*] teaches us that ocean front owners cannot enclose or develop the dry sand beach area so as to exclude the public therefrom. . . . [B]ecause of the public's ancient and continued use of the dry sand area on the Oregon coast . . . its future use thereof cannot be curtailed or limited." App. to Pet. For Cert. C-24. The trial court did not cite *McDonald*, and its peremptory dismissal prevented petitioners from doing what *McDonald* clearly contemplated their doing: providing the factual predicate for their challenge through testimony of customary use showing that their property is one of those areas "to which the doctrine of custom [was] not applicable." *McDonald, supra,* at 359, 780 P.2d, at 724. Moreover, when petitioners attempted to introduce such factual material on appeal they were rebuffed on the ground that appeal was confined to the purely legal question whether the complaint stated a claim under Oregon law. App. to Pet. For Cert. I-197 to I-198 (Tr., Mar. 3, 1993); see also *id.*, at I-185 to I-190.

In its decision here, the Supreme Court of Oregon quoted portions of *Thornton's* sweeping language appearing to declare the law of custom for all the Oregon shore. But it then read *Thornton* (which also originated in a dispute over property in Cannon Beach) to have said that the "historic public use *of the dry sand area of Cannon Beach* met [Blackstone's] requirements."

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[2] While narrowing *Thornton* in this respect, *McDonald* seemingly expanded it in another. "'Dry-sand area' as used in [*Thornton*] can apply equally to gravel beaches, beaches strewn with or even made up of boulders, and other area adjacent to the foreshore which, like the beach in [*Thornton*], have long been used for recreational purposes by the general public." 308 Ore., at 359, 780 P.2d at 724.

317 Ore., at 140, 854 P.2d, at 454 (emphasis added).[3] The court then framed the issue as the continuing validity of *Thornton* in light of *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). The court quoted our opinion in *Lucas*: "'Any limitation so severe [as to prohibit all economically beneficial use of land] cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles *of the State's law of property* and nuisance already place upon land ownership.'" 317 Ore., at 142, 854 P.2d, at 456 (quoting *Lucas*, *supra*, at 1029, (emphasis added by the Oregon court). The court held that the doctrine of custom was just such a background principle of Oregon property law, and that petitioners never had the property interests that they claim were taken by respondents' decisions and regulations. 317 Ore. At 143, 854 P.2d, at 456. It then affirmed the dismissal.

II

As a general matter, the Constitution leaves the law of real property to the States. But just as a State may not deny rights protected under the Federal Constitution through pretextual procedural rulings, see *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 455-458 (1958), neither may it do so by invoking nonexistent rules of state substantive law. Our opinion in *Lucas*, for example, would be a nullity if anything that a state court chooses to denominate "background law" — regardless of whether it is really such — could eliminate property rights. "[A] State cannot be permitted to defeat the constitutional prohibition against takings property without due process of law by the simple device of as-

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[3] This reading of *Thornton* is in my view unsupportable. *Thornton* did not limit itself to "the dry sand area of Cannon Beach." On the contrary, *Thornton* includes the following statements: "Ocean-front lands from the northern to the southern border of the state ought to be treated uniformly." 254 Ore. at 595, 462 P.2d, at 676. "This case deals solely with the dry-sand area along the Pacific shore. . . ." *Ibid.* "The custom of the people of Oregon to use the dry-sand area of the beaches for public recreational purposes meets every one of Blackstone's requisites." *Id.*, at 597, 462 P.2d, at 677. "[T]he custom of the inhabitants of Oregon and of visitors in the state to use the dry sand as a public recreation area is so notorious that notice of the custom. . .must be presumed." *Id.*, at 598, 462 P.2d, at 678. The passage in which *Thornton* actually applies Blackstone's seven-factor test contains not a single mention of the city of Cannon Beach. *Id.*, at 595-597, 462 P.2d, at 677.

serting retroactively that the property it has taken never existed at all." *Hughes v. Washington*, 389 U.S. 290, 296-297 (1967) (Stewart, J., concurring). No more by judicial decree than by legislative fiat may a State transform private property into public property without compensation. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). See also *Lucas, supra*, at 1031. Since opening private property to public use constitutes a taking, see *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831 (1987); *Kaiser Aetna v. United States*, 444 U.S. 164, 178 (1979), if it cannot fairly be said that an Oregon doctrine of custom deprived Cannon Beach property owners of their rights to exclude others from the dry sand, then the decision now before us has effected an uncompensated taking.

To say that this case raises a serious Fifth Amendment takings issue is an understatement. The issue is serious in the sense that it involves a holding of questionable constitutionality; and it is serious in the sense that the landgrab (if there is one) may run the entire length of the Oregon coast.[4] It is by no means clear that the facts — either as to the entire Oregon coast, or as to the small segment at issue here — meet the requirements set forth by Blackstone included, *inter alia*, that the public right of access be exercised without interruption, and that the custom be obligatory, *i.e.*, in the present context that it not be left to the option of each landowner whether he will recognize the public's right to go on the dry-sand area for recreational purposes. In *Thornton*, however, the Supreme Court of Oregon determined the historical existence of these fact-intensive criteria (as well as five others) in a discussion that took less than one full page of the Pacific Reporter. That is all the more remarkable a feat since the Supreme Court of Oregon was investigating these criteria *in the first instance;* the trial court had not rested its decision on the basis of custom and the State did not argue that theory to the Supreme Court.[5]

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[4] From *Thornton* to *McDonald* to the decision below, the Supreme Court of Oregon's vacillations on the scope of the doctrine of custom make it difficult to say how much of the coast is covered. They also reinforce a sense that the court is creating the doctrine rather than describing it.

[5] In *Thornton*, the Supreme Court of Oregon appears to have misread Blackstone in applying the law of custom to the entire Oregon coast. "[C]ustoms. . . affect only the inhabitants of particular districts." 1 W. Blackstone, Commentaries *74. *McDonald* seems to suggest that a

As I have described, petitioners' takings claim rests upon the assertion *both* that the new-found "doctrine of custom" is a fiction, *and* that if it exists the facts do not support its application to their property. The validity of both those assertions turns upon the facts regarding public entry —— but that is no obstacle to our review. "In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will reexamine the evidentiary basis on which those conclusions are founded." *Niemotko v. Maryland,* 340 U.S. 268, 271 (1951); see also *Broad River Power Co. v. South Carolina ex rel. Daniel,* 281 U.S. 537, 540 (1930); *Demorest v. City Bank Farmers Trust Co.,* 321 U.S. 36, 41-43 (1944). What is an obstacle to our review, however, is the fact that neither in the present case (because it was decided on motion to dismiss) nor even in *Thornton* itself (because the doctrine of custom was first injected into the case at the Supreme Court level) was any record concerning the facts compiled. It is beyond our power —— unless we take the extraordinary step of appointing a master to conduct factual inquiries —— to evaluate petitioners' takings claim.

Petitioners' due process claim, however, is another matter. Respondents' brief in opposition does not respond to that claim on its merits, but asserts that petitioners' claim has been "raise[d] for the first time in their petition for certiorari." Brief in Opposition 25. I think not. Petitioners argued that the Court of Appeals of Oregon that since they were not parties to *Thornton*, their rights to dry-sand beach could not have been determined by that decision because they "have not had their day in court." App. to Pet. For Cert. G-90 to G-92, and n. 3. In their

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custom may extend to all property "similarly situated" in terms of its physical characteristics, *i.e.,* all dry-sand beach abutting the ocean. 308 Ore., at 359, 780 P.2d at 724. That does not appear to comport with Blackstone's requirement that the custom affect "inhabitants of particular districts." See *Post v. Pearsall,* 22 Wend. 425, 440 (N.Y. Ct. Err. 1839); see also *Fitch v. Rawling,* 2 Bl. H. 394, 398-399, 126 Eng. Rep. 614, 616-617 (C. P. 1795) ("Customs must in their nature be confined to individuals of a particular description [and not to all inhabitants of England], and what is common to all mankind, can never be claimed as a custom"); *Sherborn v. Bostock,* Fitzg. 51, 94 Eng. Rep. 648, 649 (K.B. 1729) ("the custom . . . being general, and such a one as may extend to every subject, whether a citizen or a stranger, is void").

brief to the Supreme Court of Oregon, they contended that application of *Thornton* to other property owners presented a "serious proble[m] of violation of the . . . due process clause of the Fifth Amendment." App. to Pet. for Cert. H-155. I believe that petitioners have sufficiently preserved their due process claim, and believe further that the claim is a serious one. Petitioners, who owned this property at the time *Thornton* was decided, were not parties to that litigation. Particularly in light of the utter absence of record support for the crucial factual determinations in that case, whether the Oregon Supreme Court chooses to treat it as having established a "custom" applicable to Cannon Beach alone, or one applicable to all "dry-sand" beach in the State, petitioners must be afforded an opportunity to make out their constitutional claim by demonstrating that the asserted custom is pretextual. If we were to find for petitioners on this point, we would not only set right a procedural injustice, but would hasten the clarification of Oregon substantive law that casts a shifting shadow upon federal constitutional rights the length of the State.

I would grant the petition for certiorari with regard to the due process claim.